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WILCOX & CO

NO. 9916

United States Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 384

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

No. 14200-Y

Viol.: Section 5(a)(2), Securities Act of 1933, as amended (Title 15, United States Code, Section 77q(a)(2)), Section 37, Criminal Code (Title 18, United States Code, Section 88), Section 215, Criminal Code (Title 18, United States Code, Section 338)

In the District Court of the United States in and for the Southern District of California, Central Division.

At a stated term of said court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Central Division of the Southern District of California on the second Monday of September in the year of our Lord one thousand nine hundred and thirty-nine;

The grand jurors for the United States of America, impaneled and sworn in the Central Division of the Southern District of California, and inquiring for the Southern District of California, upon their oath present:

(1) That a stockholders' committee, hereinafter referred to as "The Monolith Committee," was formed in 1932 to represent stockholders of the Monolith Portland Cement Company, a Nevada corporation, and the Monolith Portland Midwest Company, a Nevada corporation; that W. J. Morgan was chairman of the committee and William Jackson Shaw was investigator for and executive sec-

retary of the committee; that said William Jackson Shaw at all times controlled and dominated said committee; that the committee instituted a vigorous and persistent campaign soliciting the stockholders of the two cement companies to deposit their securities with the committee; that in reliance on said solicitations and having great trust and confidence in the committee over 1,500 stockholders of these two companies deposited their preferred and common stock of said companies with said committee;

[2]

(2) That the Monolith committee instituted stockholders' suits to recover in excess of $2,000,000.00 alleged to be due said corporations; that as a result of litigation carried on by the committee, a judgment was entered prior to January 1, 1934, in favor of the Monolith Portland Cement Company in the amount of approximately $820,000.00, later settled for $225,000.00 paid to the corporation; that during the course of said litigation the stock of said corporation, which had been deposited with the committee, appreciated in value and the depositors with said committee continued to have great trust and confidence in said committee;

(3) The grand jurors aforesaid, upon their oaths aforesaid, further present and find that theretofore, to-wit: during the period of time commencing on or about the 12th day of December, 1933, and continuously thereafter to and including the dates of the uses of the mails as hereinafter set out, and subse-

quent thereto William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, the more full and true names of each of whom are to the grand jurors unknown, hereinafter in the several counts of this indictment sometimes called "defendants," before and at the several times of using the United States mails as hereinafter set forth, did devise and intend to devise a scheme and artifice to defraud the depositors with said committee and other persons to the grand jurors unknown and to obtain money and property by means of false and fraudulent pretenses, representations and promises from Thomas J. Allen, John W. Cline, John Wesley Cline, Jr., William L. Craig, Mrs. Mary M. D. Craig, F. D. Dodson, Mrs. Clara [3] O. Dodson, Laura I. P. Franklin, August E. Gardner, Lillian B. Gardner, Mrs. H. H. Kassow, William D. La Duke, Mrs. Adele Riche, Alberta E. Stearns, Margaret Gaud, William Schumacher, Mrs. Julia Schumacher, Patrick F. Murphy, Garfield Voget, Clayton H. Hayes, Mrs. Grace Hayes, Mrs. Frieda H. Seeger, Erna Seeger and James Kruse, and divers other persons whose names, because of their great number and want of information on the part of the grand jurors, are not stated herein, but comprising depositors with said committee and others to whom interests in the gold mining venture hereafter described should be offered, hereinafter and in the several counts of this indictment sometimes called "the persons intended to be defrauded";

(4) It was further a part of said scheme and artifice that the defendants, by the false and fraudulent representations and pretenses hereafter described, would persuade and induce the depositors with the Monolith committee, prior to the dissolution of the committee and the return of the deposited stock which had so appreciated in value to the said depositors, to transfer to the defendants the said stock deposited with the said committee in exchange for interests in and stock in a gold mining venture promoted by the defendants and would further induce by means of the said false and fraudulent representations and pretenses, the said depositors and other persons intended to be defrauded to exchange their money and property for interests and stock in the said gold mining venture;

(5) It was further a part of said scheme and artifice that the said defendants would employ and cause to be employed the trust and confidence existing between the Monolith committee and the said depositors to persuade and induce the said persons intended to be defrauded, and especially those who were depositors [4] with the Monolith committee, to switch and exchange their money and property for interests and stock in said gold mining venture hereafter described, for the purpose and with the intent on the part of the said defendants, among other things, of concealing from the persons intended to be defrauded that the defendants would obtain for the defendants' own use

a large part of the money and property obtained from them of a value of more than $75,000.00 by employing and causing to be employed the name and favorable reputation of the Monolith committee to endorse exchange by the said depositors of their cement company stock for interests and stock in the said gold mining venture, by inducing the chairman of the Monolith committee, W. J. Morgan, to become vice-president, and Henry L. Wikoff, who was then and there a member of the executive committee of the Monolith committee, to become president of Consolidated Mines of California, the corporation under whose name the gold mining venture was later conducted, and by inducing the said Morgan to write letters and permit letters to be sent over his name to the persons intended to be defrauded, which letters encouraged the depositors to make said exchange, and by employing the soliciting agents and mailing facilities of the Monolith committee to communicate to the depositors the advice that the said committee approved and encouraged the said depositors to exchange their money and property for interests and stock in the said gold mining venture;

(6) The grand jurors aforesaid, upon their oaths aforesaid, further present and show that it was a part of the said scheme and artifice: that the said defendants would at all times conceal from the said persons intended to be defrauded that William Jackson Shaw controlled the Monolith committee and would at all times further conceal from the

said persons that [5] William Jackson Shaw controlled the gold mining venture, hereafter described; that said concealment should be effected by the following means, among others: that said mining venture should not be conducted in the name of said Shaw, but should be conducted first under the name of Frank S. Tyler, and later under the name of Consolidated Mines of California, a California corporation; that it should appear that the mining venture was promoted and controlled by said Monolith committee and that said Shaw and Tyler would employ various nominees and agents to act for and on behalf of the said Shaw for the purpose and with the intent on the part of the said defendants of retaining the confidence of the said persons intended to be defrauded and with the intent on the part of the said defendants of inducing the persons intended to be defrauded to exchange their money and property for interests in the said gold mining venture;

(7) It was further a part of said scheme that Shaw and Tyler should make a secret agreement between themselves for the division between themselves of the money and property which they should obtain from the persons intended to be defrauded and that pursuant thereto Tyler should pay to Shaw most of the money and property which Tyler received from the persons to be defrauded;

(8) It was further a part of said scheme and artifice that the defendants would obtain, without

cost to themselves and in the name of Frank S. Tyler, an option to purchase for $8,000.00, payable in installments and with no down payment, three old and partially abandoned mining claims situated in Calaveras County, California, known as the Pay Day, Tunnel Site and West Extension, Mine, which, together with an old five stamp mill thereon, were known as the McKisson property; that the defendants would thereafter cause said option to be exercised, [6] and said McKisson property to be acquired for $8,000.00, with moneys obtained by the defendants from the persons intended to be defrauded; that the defendants should use the McKisson property as the principal property used as a basis for inducing the persons intended to be defrauded to pay their money and property to defendants although the Grand Prize and Mineral Lode properties, on which defendants had also obtained options without cost, which options were never exercised, were also used by the defendants to cause the persons intended to be defrauded to part with their money and property;

(9) The grand jurors aforesaid, upon their oaths aforesaid, further present and find that it was a part of the said scheme and artifice; that the said defendants would obtain, without cost to the defendants and in the name of Frank S. Tyler options which defendants did not then and there intend to exercise, to purchase for $14,000.00 an idle and partially developed mining property situated in the

County of Calaveras, State of California, consisting of the Grand Prize mining claim and the Grand Prize Extension Mine claim (formerly known as the Gold Bar Mine), hereinafter in the several counts of this indictment sometimes called the "Grand Prize property," together with an idle and partially developed property located in the County of Calaveras, State of California, consisting of the Ora Plater claims and Mineral Lode claims, hereinafter in the several counts of this indictment sometimes called the "Mineral Lode property;"

(10) It was further a part of said scheme and artifice that the said defendants would cause to be prepared a certain agreement designated as the Frank S. Tyler partnership agreement and cause to be proposed by the said agreement that, among other [7] things, a mining partnership was to be formed, and Frank S. Tyler was to convey to or hold in trust for the said partnership options to purchase the mining properties known as the McKisson, Grand Prize, and Mineral Lode.

(11) It was further a part of said scheme and artifice that the defendants would cause to be incorporated under the laws of the State of California a corporation known as Consolidated Mines of California, with its principal places of business at Calaveras County, Los Angeles, and Santa Monica, California, with Henry L. Wikoff, W. J. Morgan and Frank S. Tyler as its officers, and that the defendants would further cause the corporation to take

over the interests held by Tyler in the mining properties previously mentioned, and the defendants would cause the stock of the said corporation, which defendants then and there knew to have little or no value, to be delivered to the persons intended to be defrauded in exchange for their money and property;

(12) It was further a part of said scheme and artifice that the defendants would cause some mining operations to be conducted on the McKisson property; that from the ore mined during several months the defendants should cause to be sorted the ore of value until at last a single carload of valuable ore would be obtained, at a cost exceeding the value of the ore; that they would cause this carload of selected ore to be sent to a smelter and would cause numerous copies of the smelter return from this ore to be prepared and distributed to the persons intended to be defrauded as representative of the average ore in the mine without disclosing that said ore was selected ore, or disclosing that the returns from said ore were much less than the cost of obtaining said sorted ore; that the defendants would likewise cause other mining operations to be conducted at a loss [8] on the McKisson property for the purpose of giving color to the representations, hereafter described, which the defendants were causing to be made concerning said properties and for the purpose of deceiving the persons intended to be defrauded into believing that bona fide profit-

able mining operations were being conducted and causing them to pay and exchange their money and properties to defendants for stock of Consolidated Mines of California, or interests in the Tyler partnership agreement;

(13) It was further a part of said scheme and artifice that the said defendants in devising and executing the said scheme and artifice, would maintain offices of the Monolith committee and Consolidated Mines of California in the cities of Los Angeles and Santa Monica, California; would cause to be employed stenographers, bookkeepers, solicitors and salesmen; would prepare and cause to be prepared numerous typewritten, multigraphed, and duplicated letters soliciting the purchase of interests and stock, describing and commenting upon the alleged values of gold bearing ore in the properties above mentioned; would cause said letters to be disseminated to the public generally and especially to the said persons intended to be defrauded; and would conduct and cause to be conducted an extensive and persistent campaign urging the purchase of subscriptions to the Frank S. Tyler partnership agreement, and of the stock of the Consolidated Mines of California;

(14) It was further a part of the said scheme that the defendants would maintain brokerage accounts in their own and in other names with various Los Angeles brokers and cause the stock of the

Monolith Portland Cement Company, the Monolith Portland Midwest Company, and the certificates of deposits for the said securities theretofore delivered to the defendants by the said [9] investors to be sold and liquidated and the proceeds therefrom paid to defendants;

(15) It was further a part of said scheme and artifice that the defendants would at all times conceal from the persons intended to be defrauded the true condition of the mining properties, the results of operations on the properties and the financial condition of the enterprise and that the corporation would have no meetings of stockholders, annual or otherwise, that the corporation would send its stockholders no annual or other reports, balance sheets, profit and loss statements or other financial statements showing the condition of the corporation, the properties, the results of operations or the large amounts of moneys taken by the defendants for their own use, and it was further a part of said scheme and artifice that said defendants should send through the United States mails to the persons intended to be defrauded numerous letters which should promise financial statements at later dates, which promises were made without any intention of keeping them, should state the mining venture was progressing well and favorably and should lull the persons intended to be defrauded into believing that the mining venture was progressing satisfactorily, thereby enabling defendants to sell them more stock

and get more money and property for themselves, and also preventing the persons intended to be defrauded from discovering the true status of the mining venture, the moneys taken by defendants and thereby preventing the persons intended to be defrauded from taking action to protect their rights;

(16) The grand jurors aforesaid, upon their oaths aforesaid, further present and find that it was a part of the said scheme and artifice aforesaid, that the said defendants would by numerous false and fraudulent pretenses, representations, [10] and promises, by means of typewritten, multigraphed, and duplicated letters and by oral solicitations, persuade, induce, and entice the said investors to subscribe to the Frank S. Tyler partnership agreement and to purchase the capital stock of Consolidated Mines of California, and to pay and exchange to defendants their money and property which defendants would convert to their own use, which said false and fraudulent pretenses, representations, and promises were to be and were substantially as follows, to-wit:

(a) That members of the stockholders protective committee of the Monolith companies would manage, control and direct the operations at the mining properties, when in truth and in fact, as the defendants and each of them then and there well knew, members of the stockholders protective committee of the Monolith companies would not manage, control or direct operations at the mining properties, but,

on the contrary, William Jackson Shaw would manage, control and direct such operations as were carried on at the mining properties;

(b) That W. J. Morgan, the chairman of the Monolith committee, had transferred, traded and switched his investment in the securities of the Monolith Portland Cement Company to an interest and investment in the Tyler agreement or to stock in Consolidated Mines of California, when in truth and in fact, as the defendants and each of them then and there well knew, the said W. J. Morgan had not transferred, traded or switched his investment in the securities of the Monolith Portland Cement Company to an interest or investment in the Frank S. Tyler partnership agreement or stock of Consolidated Mines of California, but, on the contrary, W. J. Morgan had no interest or investment in said mining properties, or the Frank S. Tyler partnership agreement or in the stock of Consolidated Mines of California; **[11]**

(c) That Frank S. Tyler was an engineer, meaning thereby and intending the persons intended to be defrauded to believe that Frank S. Tyler was a mining engineer, when in truth and in fact, as the defendants and each of them then and there well knew, Tyler was not a mining engineer, but on the contrary, Frank S. Tyler was a civil engineer;

(d) That Frank S. Tyler was an experienced mining man, when in truth and in fact, as the defendants and each of them then and there well

knew, Frank S. Taylor was not an experienced mining man, but on the contrary, Frank S. Tyler had no previous mining experience;

(e) That the offer of the privilege and opportunity to subscribe to and participate in this gold mining venture was limited, restricted and only available to shareholders of the Monolith Portland Cement Company and the Monolith Portland Midwest Company, when in truth and in fact, as the defendants and each of them then and there well knew, the said offer was not limited, restricted or only available to the said shareholders, but on the contrary, the said offer was made to persons who had never owned securities of either company at any time;

(f) That the securities and cash contributed by purchasers of interests and stock in this mining venture would be used to pay the expenses of mining said properties, meaning thereby and intending that the persons to be defrauded should believe that all of the money and property provided by them would be devoted to financing development and operations costs of the mining venture on said properties, when in truth and in fact, as the defendants and each of them then and there well knew, all of the money and property so provided would not be devoted to financing development or operations costs of the mining venture, but, on the contrary, a large portion, namely, in excess of $75,000.00 of the securities [12] and cash contributed by persons intended to be

defrauded was, without the knowledge of the persons intended to be defrauded, intended to be and was diverted to the personal use of the defendants;

(g) That the funds and proceeds derived from the sale and liquidation of the securities of the Monolith Portland Midwest Company paid defendants by the purchasers of interests and stock in this mining venture would be used to erect a mill, when in truth and in fact, as the defendants and each of them then and there well knew, the funds and proceeds derived from the sale and liquidation of the securities of the Monolith Portland Midwest Company would not and were not and were not intended to be used to erect a mill, but, on the contrary, a five stamp mill had theretofore been erected and was being operated on the McKisson property and the defendants then and there intended to convert all of said funds to their own use;

(h) That Consolidated Mines of California had no debts, when in truth and in fact as the defendants and each of them then and there well knew, the said corporation did have debts, and as they well knew, Consolidated Mines of California owed the entire purchase price on its mining properties and was also liable to Shaw and Tyler for nearly all the sums expended on the properties for mining and development, said sums having been "loaned" by Shaw and Tyler to the corporation out of the moneys which Shaw and Tyler had obtained from the persons who were intended to be defrauded;

(i) That there were large amounts of rich ore established as present in the McKisson property, meaning thereby, and intending the persons intended to be defrauded to believe that large quantities of gold bearing ore which could be extracted [13] and milled at a large profit to investors had been established as being present in the McKisson property, when in truth and in fact, as the defendants and each of them then and there well knew, neither large amounts of rich ore nor large or any quantities of ore which could be extracted or milled at a large or any profit to investors had been established as being present in the said property, and in fact such mining operations as were carried on were carried on at a loss, as said defendants and each of them well knew;

(j) That there were established as present in the McKisson property shoots and lenses of valuable ore ranging in length from 30 to 300 feet, meaning thereby and intending the persons intended to be defrauded to believe that there were established as present in the McKisson property numerous shoots and lenses of ore which could be mined and milled at a profit, when in truth and in fact, as the defendants and each of them then and there well knew, there were not established as present in the McKisson property either shoots or lenses of valuable ore ranging in length from 30 to 300 feet or numerous shoots or lenses of ore which could be mined and milled at a profit, but, on the contrary, as the de-

fendants and each of them well knew, but did not disclose to the persons intended to be defrauded, the shoots and lenses present ranged from 14 to 20 inches in width and could not be and were not extracted without a material dilution by the intermingling of the surrounding waste rock, that such shoots and lenses, therefore, did not contain valuable ore, and mining operations were always carried on at a loss, as said defendants and each of them then and there well knew;

(k) That the general dump samples of the McKisson property gave values of $25.90 per ton, meaning thereby and [14] intending the persons intended to be defrauded to believe that an average of samples taken from the general ore dump assayed at $25.90, when in truth and in fact, as the defendants and each of them then and there well knew, neither the general dump sample of the McKisson property nor an average of samples taken from the general ore dump would or did assay at $25.90 per ton or any sum of commercial value, but, on the contrary, the $25.90 value referred to resulted from an assay of a single sample taken from a small dump of selected ore and was not taken from the general dump;

(l) That a shipment of 33 tons of ore from the McKisson mine to a smelter had proved to have a gross value of $37.26 per ton, meaning thereby that $37.26 per ton was representative of the values of ore in the McKisson mine which would be available

for milling, when in truth and in fact, as the defendants and each of them then and there well knew, but did not disclose to the persons intended to be defrauded, $37.26 per ton was not representative of the value of ore which would be available in the McKisson mine for milling, but, on the contrary, $37.26 per ton represented the results of careful and expensive handsorting of better grade vein matter from inferior vein matter and waste rock, and said shipment operation was carried on at a loss;

(m) That the officers of Consolidated Mines of California were receiving no salaries and would receive none until the properties got on a paying basis, meaning thereby and intending the persons intended to be defrauded to believe that the persons who controlled and directed the affairs of Consolidated Mines of California were receiving no compensation or remuneration out of their relationship with the said corporation and would receive none until the properties were on a paying [15] basis, when in truth and in fact, as the defendants and each of them then and there well knew, but did not disclose to the persons intended to be defrauded, the said defendants who controlled and directed the affairs of the said corporation intended to receive and did receive large amounts of money in excess of $75,000.00, for their personal use from the money and property paid by the persons intended to be defrauded, and said properties never got on a paying basis;

(n) That the operations at the mining properties were being carried on satisfactorily, when in truth and in fact, as the defendants and each of them then and there well knew, the operations at the said properties were not being carried on satisfactorily, but, on the contrary, the operations were resulting in large losses;

(o) That the subscribers to the Frank S. Tyler partnership agreement would receive dividends soon, when in truth and in fact, as the defendants and each of them then and there well knew, the subscribers to the Frank S. Tyler partnership agreement would not receive dividends soon, or at all, but, on the contrary, as the defendants and each of them then and there well knew, but did not disclose to the persons intended to be defrauded, the ore which had been or could be extracted from said properties was of insufficient quantity and value to be milled at a profit, there were no net earnings available from which dividends could be paid, the concern had no working capital, was heavily in debt, the mine was not developed, there was no profitable ore blocked out or mined, and mining operations were at all times being carried on at a loss;

(p) That the stockholders of Consolidated Mines of California would be paid dividends within a few months, when in [16] truth and in fact, as the defendants and each of them then and there well knew, the Stockholders of Consolidated Mines of California would not be paid dividends within a

few months or at all, but on the contrary, as the defendants and each of them then and there well knew, but did not disclose to the persons intended to be defrauded, the ore which had been or could be extracted from said properties was of insufficient quantity and value to be milled at a profit, there were no net earnings available from which dividends could be paid, the concern had no working capital and was heavily in debt, the mine was not developed, there was no profitable ore blocked out or mined, and mining operations were at all times being carried on at a loss;

(q) That the owners of the securities of the Monolith Portland Cement Company and the Monolith Portland Midwest Company would get back all of the funds originally invested by them in the said securities by exchanging the said securities for the capital stock of Consolidated Mines of California, when in truth and in fact, as the defendants and each of them then and there well knew, the owners of the securities of the Monolith Portland Cement Company and the Monolith Portland Midwest Company would not get back all or any of the funds originally invested by them in the said securities by exchanging said securities for the capital stock of Consolidated Mines of California, but, as the defendants and each of them then and there well knew but did not disclose to the persons intended to be defrauded, on the contrary, the capital stock of Consolidated Mines of California did not and would not have any value;

(r) That the owners of the securities of the Monolith Portland Cement Company and the Monolith Portland Midwest Company would recover the original investment made by them in the said [17] securities out of dividends received by them from Consolidated Mines of California; when in truth and in fact, as the defendants and each of them then and there well knew, the owners of the securities of the Monolith Portland Cement Company and the Monolith Portland Midwest Company would not recover the original investment made by them in the said securities or any of said investment, out of dividends received by them from Consolidated Mines of California, but on the contrary, as the defendants and each of them then and there well knew, but did not disclose to the persons intended to be defrauded, the capital stock of Consolidated Mines of California would not pay any dividends, the ore which had been or could be extracted from said properties was of insufficient quantity and value to be milled at a profit, there were no net earnings available from which dividends could be paid, the concern had no working capital and was heavily in debt, the mine was not developed, there was no profitable ore blocked out or mined, and mining operations were at all times being carried on at a loss;

(s) That the reason for offering a gold mining investment to the depositors with the Monolith Committee in exchange for their stock of the Monolith Portland Cement Company and the Monolith Port-

land Midwest Company was to enable the said investors to recover the money originally invested by them in the said stock, when in truth and in fact, as the defendants and each of them then and there well knew, the reason for offering the gold mining investment to the said investors in exchange for their said stock was not to enable the said investors to recover the money originally invested by them in the said stock, but on the contrary, as the defendants and each of them then and there well knew, the reason for the said offer was to enable the [18] defendants to obtain for their own use from the persons intended to be defrauded property and money of a value in excess of $75,000.00, without giving to the persons intended to be defrauded property or money of an equivalent value or of any value whatever.

That all of the foregoing pretenses, representations and promises, when so made and caused to be made to the said persons intended to be defrauded by the said defendants, as the defendants and each of them then and there well knew, would be and were intended to be false and fraudulent, and were made with the intent to cheat and defraud the persons intended to be defrauded.

(17) The grand jurors aforesaid, upon their oath aforesaid, do further present and find that the said defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, on or about the 30th day of March, 1937, at Los Angeles, County of Los Angeles, state, division and district afore-

said, and within the jurisdiction of the United States and of this Honorable Court, for the purpose of executing said scheme and artifice unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office there, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Garfield Voget at Hubbard, Oregon, to-wit: a letter of the following tenor: [19]

H. L. Wikoff
President
W. J. Morgan
Executive Vice President
Frank S. Tyler
Secretary Treasurer

CONSOLIDATED MINES OF CALIFORNIA
634 South Spring Street
Telephone TRinity 9606
Los Angeles, California

March 30, 1937

Mr. Garfield Voget,
Hubbard, Oregon.

Dear Mr. Voget:

The delay in answering your letter is due to the fact that the Company is getting out an annual report which will give you full informa-

tion. This should be available in the near future; but in the meantime we want to assure you that the progress made to date is very satisfactory.

Very truly yours,
CONSOLIDATED MINES OF CALIFORNIA,
By FRANK S. TYLER,
Secretary.

FST:S [20]

(Envelope—postmarked Los Angeles, Mar. 31, 1937)

(from)
Consolidated Mines of California
634 South Spring Street
Los Angeles, California

(to)
Mr. Garfield,
Hubbard, Oregon. [21]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [22]

Second Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations

of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about July 1, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Santa Monica, California, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Miss Laura I. P. Franklin, P. O. Box 254, Victorville, California, to-wit: a letter of the following tenor:

[23]

CONSOLIDATED MINES OF CALIFORNIA
Bay Cities Building
Santa Monica, Calif.
Telephone 20958

July 1, 1937

Miss Laura I. P. Franklin,
P.O. Box 254,
Victorville, California.

Dear Miss Franklin:

Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

Mr. Colman O'Shea, who has had a wide experience in the operation of quartz mines, has been put in charge of operations at the mine.

Mr. Byron E. Rowe, who has successfully operated mines in this section for over thirty years, has been made "Assistant to the President" and put in full charge of directing policy and methods of mining and development.

These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

Not one of your officers is on the payroll and they will not be, until the corporation is paying satisfactory dividends; and they are just as anxious as you are, to receive them.

We have moved to our new location in the Bay Cities Building, Santa Monica, California—not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California; but because it is more practical and less expensive.

In the future you will be kept fully informed as to important developments and decisions.

On behalf of the Board,

FRANK S. TYLER,

Secretary

FST:S [24]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [25]

Third Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about July 3, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Santa Monica, California, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mr. John W. and John Wesley Cline, R. 1, Box 515, San Jose, California, to-wit: a letter of the following tenor: [26]

CONSOLIDATED MINES OF CALIFORNIA
Bay Cities Building
Santa Monica, Calif.
Telephone 20958

July 1, 1937

Mr. John W. and John Wesley Cline,
R 1, Box 515,
San Jose, California.

Dear Mr. Cline:

Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

Mr. Colman O'Shea, who has had a wide experience in the operation of quartz mines, has been put in charge of operations at the mine.

Mr. Byron E. Rowe, who has successfully operated mines in this section for over thirty years, has been made "Assistant to the President" and put in full charge of directing policy and methods of mining and development.

These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

Not one of your officers is on the payroll and they will not be, until the corporation is paying satisfactory dividends; and they are just as anxious as you are, to receive them.

We have moved to our new location in the Bay Cities Building, Santa Monica, California—not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California, but because it is more practical and less expensive.

In the future you will be kept fully informed as to important developments and decisions.

On behalf of the Board,
FRANK S. TYLER,
Secretary

FST:S [27]

(Envelope—postmarked Santa Monica, Calif., Jul. 3, 1937)

(from)
Consolidated Mines of California
634 South Spring Street
Los Angeles, California

(to)
Mr. John W. and John Wesley Cline,
R. 1, Box 515,
San Jose, California. [28]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [29]

Fourth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about April 9, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Los Angeles, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mrs. C. E. Seeger at 3161 College Avenue, Berkeley, California, to-wit: a letter of the following tenor: [30]

H. L. Wikoff
President

W. J. Morgan
Executive Vice President

Frank S. Tyler
Secretary-Treasurer

CONSOLIDATED MINES OF
CALIFORNIA
634 South Spring Street
Telephone TRinity 9606
Los Angeles, California

April 9, 1937.

Mrs. C. E. Seeger,
3161 College Avenue,
Berkeley, California.

Dear Mrs. Seeger:

Answering your letter of April 8th, this is to advise you that the Company is getting out an annual report which will give you full information. This should be available in the near future; but in the meantime we want to assure you that the progress made to date is very satisfactory.

Very truly yours,
CONSOLIDATED MINES OF
CALIFORNIA,
By FRANK S. TYLER,
Secretary

FST:S [31] S.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [31A]

Fifth Count.

And the grand jurors aforesaid, do further present, on their oath aforesaid:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about July 7, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Santa Monica, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mr. William and Julia A. Schumacher, 2015 William Street, Eugene, Oregon, to-wit: a letter of the following tenor: [32]

CONSOLIDATED MINES OF
CALIFORNIA
Bay Cities Building
Santa Monica, Calif.
Telephone 20958

July 1, 1937

Mr. William and Julia A. Schumacher,
2015 William Street,
Eugene, Oregon.

Dear Mr. and Mrs. Schumacher:

Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

Mr. Colman O'Shea, who has had a wide experience in the operation of quartz mines, has been put in charge of operations at the mine.

Mr. Byron E. Rowe, who has successfully operated mines in this section for over thirty years, has been made "Assistant to the President" and put in full charge of directing policy and methods of mining and development.

These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

Not one of your officers is on the payroll and they will not be, until the corporation is paying

satisfactory dividends; and they are just as anxious as you are, to receive them.

We have moved to our new location in the Bay Cities Building, Santa Monica, California —not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California; but because it is more practical and less expensive.

In the future you will be kept fully informed as to important developments and decisions.

On behalf of the Board,
FRANK S. TYLER,
Secretary

FST:S [33]

(Envelope—postmarked Santa Monica, Calif., Jul. 7, 1937)

(from)
Consolidated Mines of California
634 South Spring Street
Los Angeles, California

(to)
Mr. William and Julia A. Schumacher,
2015 William Street,
Eugene, Oregon. [34]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [35]

Sixth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about July 7, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Santa Monica, County of Los Angeles, state, division and district aforesaid, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mr. Augustus E. and Lillian B. Gardner at 318 1st St., South, Forest Grove, Oregon, to-wit: a letter of the following tenor: [36]

CONSOLIDATED MINES OF
CALIFORNIA
Bay Cities Building
Santa Monica, Calif.
Telephone 20958

July 1, 1937

Mr. Augustus E. and Lillian B. Gardner,
318 1st St., South,
Forest Grove, Oregon.

Dear Mr. and Mrs. Gardner:

Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

Mr. Colman O'Shea, who has had a wide experience in the operation of quartz mines, has been put in charge of operations at the mine.

Mr. Byron E. Rowe, who has successfully operated mines in this section for over thirty years, has been made "Assistant to the President" and put in full charge of directing policy and methods of mining and development.

These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

Not one of your officers is on the payroll and they will not be, until the corporation is paying

satisfactory dividends; and they are just as anxious as you are, to receive them.

We have moved to our new location in the Bay Cities Building, Santa Monica, California —not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California; but because it is more practical and less expensive.

In the future you will be kept fully informed as to important developments and decisions.

On behalf of the Board,
FRANK S. TYLER,
Frank S. Tyler, Secretary

FST:S [37]

(Envelope—postmarked Santa Monica, Calif., Jul. 7, 1937)

(from)
Consolidated Mines of California
634 South Spring Street
Los Angeles, California

(to)
Mr. Augustus N. and Lillian B. Gardner,
318 1st St., South,
Forest Grove, Oregon. [38]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [39]

Seventh Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about April 1, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Los Angeles, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mrs. Grace Hayes at Rt. 1, Box 270, Fresno, California, to-

wit: a letter of the following tenor: [40]

H. L. Wikoff
President

W. J. Morgan
Executive Vice President

Frank S. Tyler
Secretary-Treasurer

CONSOLIDATED MINES OF
CALIFORNIA
634 South Spring Street
Telephone TRinity 9606
Los Angeles, California

April 1, 1937

Mrs. Grace Hayes,
Rt. 1, Box 270,
Fresno, California.

Dear Mrs. Hayes:

Answering your letter of March 31, 1937, the Company is preparing an annual report which will give you full information. This should be available in the near future; but in the meantime we want to assure you that the progress made to date is very satisfactory.

Very truly yours,
CONSOLIDATED MINES OF
CALIFORNIA
By FRANK S. TYLER,
Frank S. Tyler, Secretary

FST:S [41]

(Envelope—postmarked Los Angeles, Apr. 1, 1937)

(from)
Consolidated Mines of California
634 South Spring Street
Los Angeles, California

(to)
Mrs. Grace Hayes,
Rt. 1, Box 270,
Fresno, California. [42]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [43]

Eighth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about September 9, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowing-

ly place and cause to be placed in the United States Post Office at Santa Monica, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mr. Patrick F. Murphy at 233 North 3d St. San Jose California, to-wit: a letter of the following tenor:

[44]

CONSOLIDATED MINES OF
CALIFORNIA
Bay Cities Building
Santa Monica, California
Telephone 20958

September 1, 1937.

Mr. Patrick F. Murphy
233 North Third St.
San Jose, California.

Dear Mr. Murphy:

Under date of July 1, you were advised of certain changes made in the policy and personnel of your company. Since that time the progress made has been extremely gratifying.

Underground work has gone forward steadily, increasing the availability of ore for the mill. This work has progressed to such a stage that we are able to now announce that starting within the next ten days production will be increased to approximately 750 tons per month. We feel that this will immediately produce the

results to which we all have been looking forward.

Your President was one of the subscribers to the original Tyler Agreement, having exchanged a substantial block of Monolith Common, Preferred and Midwest Stock on the same basis as all the other original partners, as well as putting up cash, and I believe we made a wise move when we joined Mr. Frank S. Tyler in this enterprise.

You will be advised in the near future of results obtained.

Very truly yours,
CONSOLIDATED MINES OF CALIFORNIA
By H. L. WIKOFF,
H. L. Wikoff, President

DD [45]

(Envelope—postmarked Santa Monica, Sep. 9, 1937)

(from)
Consolidated Mines of California
Bay Cities Building
Santa Monica, California

(to)
Mr. Patrick F. Murphy
233 North 3d St.
San Jose California [46]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [47]

Ninth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about July 3, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Santa Monica, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mrs. Marie M. D. Craig, at R. F. D. #1, Riverdale, California, to-wit: a letter of the following tenor: [48]

CONSOLIDATED MINES OF CALIFORNIA
Bay Cities Building
Santa Monica, Calif.
Telephone 20958

July 1, 1937

Mrs. Marie M. D. Craig,
R. F. D. #1,
Riverdale, California.

Dear Mrs. Craig:

Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

Mr. Colman O'Shea, who has had a wide experience in the operation of quartz mines, has been put in charge of operations at the mine.

Mr. Byron E. Rowe, who has successfully operated mines in this section for over thirty years, has been made "Assistant to the President" and put in full charge of directing policy and methods of mining and development.

These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

Not one of your officers is on the payroll and they will not be, until the corporation is pay-

ing satisfactory dividends; and they are just as anxious as you are, to receive them.

We have moved to our new location in the Bay Cities Building, Santa Monica, California —not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California; but because it is more practical and less expensive.

In the future you will be kept fully informed as to important developments and decisions.

On behalf of the Board,
FRANK S. TYLER
Frank S. Tyler, Secretary

FST:S [49]

(Envelope—postmarked Santa Monica, Jul. 3, 1937)
(from)
Consolidated Mines of California
634 South Spring Street
Los Angeles, California.

(to)
Mrs. Marie M. D. Craig,
R. F. D. #1,
Riverdale, California. [50]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [51]

Tenth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about September 8, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Santa Monica, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to F. D. and Clara Dodson at 1116½ W. 21st St. Los Angeles California, to-wit: a letter of the following tenor: [52]

CONSOLIDATED MINES OF CALIFORNIA
Bay Cities Building
Santa Monica, California
Telephone 20958

September 1, 1937.

Mr. and Mrs. F. D. Dodson
1116½ W. 21st St.
Los Angeles California

Dear Mrs. and Mrs. Dodson:

Under date of July 1, you were advised of certain changes made in the policy and personnel of your company. Since that time the progress made has been extremely gratifying.

Underground work has gone forward steadily, increasing the availability of ore for the mill. This work has progressed to such a stage that we are able to now announce that starting within the next ten days production will be increased to approximately 750 tons per month. We feel that this will immediately produce the results to which we all have been looking forward.

Your President was one of the subscribers to the original Tyler Agreement, having exchanged a substantial block of Monolith Common, Preferred and Midwest Stock on the same basis as all the other original partners, as well as putting up cash, and I believe we made a wise move when we joined Mr. Frank S. Tyler in this enterprise.

You will be advised in the near future of results obtained.

Very truly yours,
CONSOLIDATED MINES
OF CALIFORNIA
By H. L. WIKOFF,
H. L. Wikoff, President

DD [53]

(Envelope—postmarked Santa Monica, Sep. 8, 1937)
(from)

Consolidated Mines of California
Bay Cities Building
Santa Monica, California

(to)
F. D. and Clara Dodson
1116½ W. 21st St.
Los Angeles California [54]

Cortrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [55]

Eleventh Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about July 3, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and cause to be placed in the United States Post Office at Los Angeles, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mrs. Alberta E. Stearns at 329 No. Kenmore, Los Angeles, California, to-wit: a letter of the following tenor: [56]

CONSOLIDATED MINES OF CALIFORNIA
Bay Cities Building
Santa Monica, Calif.
Telephone 20958

July 1, 1937

Mrs. Alberta E. Stearns,
329 North Kenmore,
Los Angeles, California.

Dear Mrs. Stearns:

Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

Mr. Colman O'Shea, who has had a wide experience in the operation of quartz mines, has

been put in charge of operations at the mine.

Mr. Byron E. Rowe, who has successfully operated mines in this section for over thirty years, has been made "Assistant to the President" and put in full charge of directing policy and methods of mining and development.

These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

Not one of your officers is on the payroll and they will not be, until the corporation is paying satisfactory dividends; and they are just as anxious as you are, to receive them.

We have moved to our new location in the Bay Cities Building, Santa Monica, California —not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California; but because it is more practical and less expensive.

In the future you will be kept fully informed as to important developments and decisions.

On behalf of the Board,

FRANK S. TYLER

Frank S. Tyler, Secretary

FST:S [57]

(Envelope—postmarked Los Angeles, Jul. 3, 1937)
(from)

Consolidated Mines of California
634 South Spring Street
Los Angeles, California

(to)
Mrs. Alberta E. Stearns,
329 No. Kenmore,
Los Angeles, California. [58]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [59]

Twelfth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if set forth at length, all of the allegations of the first count of this indictment, except those allegations alleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about March 8, 1939, at Los Angeles, in the Central Division of the Southern District of California, and within the jusisdiction of the United States and of this Honorable Court, then having devised the scheme and artifice in said first count described, did knowingly place and cause to be placed in the United States Post Office at Los Angeles, to be sent and delivered by

the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Mr. James Kruse, 1127 Laguna Street, San Francisco, California, to-wit: a letter of the following tenor: [60]

W. J. SHAW & CO.
Investments
634 South Spring Street
Los Angeles
Trinity 9606
Established 1914

March 8, 1937

Mr. James Kruse,
1127 Laguna Street,
San Francisco, California.

Dear Mr. Kruse:

My reason for not answering your letter promptly is that I have been expecting to come to San Francisco every day for some time, and I thought it best to have a personal talk with you, to go over the matter, so that you might understand the whole situation.

I will be in San Francisco very soon now, and will give you a call upon my arrival.

With kindest regards,

Yours very truly,

W. J. SHAW

WJS:S [61]

(Envelope—postmarked Los Angeles, Mar. 8, 1937)
(from)

W. J. Shaw & Co.
Investments
634 South Spring Street
Los Angeles

(to)
Mr. James Kruse,
1127 Laguna Street,
San Francisco, California. [62]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [63]

Thirteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present:

That they do reallege and incorporate herein, as if again set forth at length, all of the allegations of the first count of this indictment, except those allegations allleging the mailing of the letter referred to in said count and describing said letter;

That the defendants, on or about July 1, 1937, then having devised the scheme and artifice in said first count described, for the purpose of executing the same, in the Central Division of the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did knowingly place and

cause to be placed in the United States Post Office at Santa Monica, California, to be sent and delivered by the Post Office Establishment of the United States, according to the directions thereon, a certain letter in a postpaid envelope addressed to Miss Margaret Gaud, 329 N. Kenmore, Los Angeles, California, to-wit: a letter of the following tenor: [64]

CONSOLIDATED MINES OF
CALIFORNIA
Bay Cities Building
Santa Monica, Calif.
Telephone 20958

July 1, 1937

Miss Margaret Gaud,
329 N. Kenmore,
Los Angeles, California.

Dear Miss Gaud:

Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

Mr. Colman O'Shea, who has had a wide experience in the operation of quartz mines, has been put in charge of operations at the mine.

Mr. Byron E. Roe, who has successfully operated mines in this section for over thirty years, has been made "Assistant to the President" and put in full charge of directing policy and methods of mining and development.

These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

Not one of your officers is on the payroll and they will not be, until the corporation is paying satisfactory dividends; and they are just as anxious as you are, to receive them.

We have moved to our new location in the Bay Cities Building, Santa Monica, California —not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California; but because it is more practical and less expensive.

In the future you will be kept fully informed as to important developments and decisions.

On behalf of the Board,

FRANK S. TYLER,

Frank S. Tyler, Secretary

FST:S [65]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [66]

Fourteenth Count

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the de-

fendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore, on or about December 21, 1936, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, knowingly, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certificate, No. 732, for 250 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Dr. Homer J. Arnold and Florence R. Arnold, no registration statement being in effect as to such security and no exemption from registration being available, and said deilvery by the United States mails was in the manner following, to-wit:

Said defendants on or about December 21, 1936, caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a postpaid envelope addressed to Dr. Homer J. and Florence R. Arnold, 345 South Norton, Los Angeles, California, enclosing said security, which said security was of the following tenor, to-wit: [67]

Number 732 Shares **250**

Incorporated under the laws of the
State of California

CONSOLIDATED MINES OF
CALIFORNIA

Capital Stock 1,000,000 Shares
No Par Value

Fully Paid, Fully Voting and Non-assessable

This Certifies that Homer J. Arnold and Florence R. Arnold, Joint Tenants, with full rights of Survivorship is the registered holder of Two Hundred Fifty Shares, being the shares represented hereby, of Consolidated Mines of California hereinafter designated "the Corporation," transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the seal of the Corporation and the signatures of its duly authorized officers, this 14th day of December, A. D. 1936.

H. L. WIKOFF
President

FRANK S. TYLER
Secretary [68]

For value received.....
hereby sell, assign and transfer unto.....
..... shares
of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint .....
Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated.....

.....

In presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever. [69]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [70]

Fifteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore on or about June 3, 1937, at Los Angeles, County of Los

Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, wilfully, knowingly, unlawfully and feloniously did cause to be delivered by the United States mails a certain security, to wit: a certificate number 741, for 30 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Regina Woodruff, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to wit:

Said defendants on or about June 3, 1937 caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mrs. Regina Woodruff, 802 North Vermont, Los Angeles, California, enclosing said security, which said security was of the tenor following, to-wit: [71]

Number 741 Shares 30

Incorporated under the laws of the
State of California

CONSOLIDATED MINES OF
CALIFORNIA

Capital Stock 1,000,000 Shares
No Par Value
Fully Paid, Fully Voting and Non-assessable

This Certifies that Regina Woodruff is the registered holder of Thirty Shares, being the

shares represented hereby, of Consolidated Mines of California hereinafter designated "the Corporation," transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the seal of the Corporation and the signatures of its duly authorized officers, this 13th day of May, A. D. 1937.

H. L. WIKOFF
President

FRANK S. TYLER
Secretary [72]

For value received.....
hereby sell, assign and transfer unto.....
..... shares
of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint .....
Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated.....

.....

In presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever. [73]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [74]

Sixteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore on or about June 8, 1937, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, wilfully, knowingly, unlawfully and feloniously did cause to be delivered by the United States mails a certain security, to wit: a certificate, number 742, for 18 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to J. C. and E. M. Goodrich, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to wit:

Said defendants on or about June 8, 1937, caused to be delivered by the Post Office Establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mr. J. C. and E. M. Goodrich, 4532 South Wilton Street, Los Angeles, California, enclosing said security, which said security was of the tenor following, to-wit:

[75]

Number 742 Shares 18

Incorporated under the laws of the
State of California

CONSOLIDATED MINES OF
CALIFORNIA

Capital Stock 1,000,000 Shares
No Par Value
Fully Paid, Fully Voting and Non-assessable

This Certifies that J. C. Goodrich and E. M. Goodrich, Joint Tenants with full rights of survivorship is the registered holder of Eighteen Shares, being the shares represented hereby, of Consolidated Mines of California hereinafter designated "the Corporation," transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the Seal of the Corporation and the signatures of its duly authorized officers, this 8th day of June, A. D. 1937.

H. L. WIKOFF
President

FRANG S. TYLER
Secretary [76]

For value received.....
hereby sell, assign and transfer unto.....
.....shares
of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint .....
Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated.....

.....

In presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever. [77]

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [78]

Seventeenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the said defendants, William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, beginning on or about December 12, 1933, and continuously thereafter to and including September 15, 1937, in the Southern District of California, and within the jurisdiction of the United States and of this Honorable Court, unlawfully and feloniously did conspire, combine, confederate and agree together and with each other, to commit divers offenses against the United States, to wit, the divers offenses charged against said defendants in the divers counts of this indictment preceding this count, and made offenses by Section 338, Title 18, United States Code, and Section 77q (a) (2), Title 15, United States Code, the allegations concerning which are hereby incorporated by reference to such counts, and that said defendants would thereafter within the jurisdiction of this Court do divers overt acts to effect the object of said unlawful and felonious conspiracy, to wit, the several acts of placing letters, circular letters and securities in the Post Offices of the United States at Los Angeles, California, and Santa Monica, California, described in the foregoing counts of this indictment, the allegations of said counts concerning these acts being herein incorporated by reference, and numerous acts of preparing said letters, circular letters and

securities for mailing and delivery and of making the false representations, pretenses and promises set forth in the first count of this indictment, the allegations concerning the making of such false representations, pretenses and promises being hereby incorporated by reference, as well as certain other overt acts now here specified, that is to say:

(1) On or about December 14, 1936, at Los Angeles, California, defendant William Jackson Shaw did affix his signature "W. J. Shaw" to a certain letter addressed to Mr. George J. Porteous, [79] West Point, California, which letter included the following with regard to a new agreement whereby Consolidated Mines of California, a corporation, would obtain rights in and to the Grand Prize and Mineral Lode properties:

> "Please have the deeds to the two properties made out in favor of Frank S. Tyler, and deposit them with the Bank of America at Jackson, California; with instructions to the bank to deliver them upon the receipt of five thousand (5000) shares of the common stock of the Consolidated Mines of California."

(2) On or about December 16, 1936, at Los Angeles, California, defendants William Jackson Shaw and Frank S. Tyler caused to be deposited in the California Bank for collection and payment a certain check dated December 14, 1936, drawn on the bank of America, by Florence R. Arnold and pay-

able to the order of W. J. Shaw in the amount of $420.00.

(3) On or about March 8, 1937, at Los Angeles, California, defendant William Jackson Shaw did affix his signature "W. J. Shaw", to a certain letter addressed to James Kruse, which letter is set out in full in Count 12 above, and is herein incorporated by reference.

(4) On or about December 19, 1936, at Los Angeles, California, defendants William Jackson Shaw and Frank S. Tyler caused to be delivered through the United States mails a certain letter of transmittal addressed to Dr. Homer J. and Florence R. Arnold, 1345 South Norton, Los Angeles, California, which letter included the following with regard to purchase of stock of Consolidated Mines of California.

> "Enclosed please find Certificate No. 732 for Two Hundred Fifty (250) shares of stock of the Consolidated Mines of California."

(5) On or about April 23, 1937, at Los Angeles, California, defendant William Jackson Shaw delivered to Mary F. Claypool, certificate No. 737 for 220 shares of the capital stock of Consolidated Mines of California.

(6) On or about May 13, 1937, at Los Angeles, California, defendants William Jackson Shaw and Frank S. Tyler caused to be issued in the names of J. C. and E. M. Goodrich, certificate No. 714 for

18 [80] shares of the capital stock of Consolidated Mines of California.

(7) On or about May 13, 1937, at Los Angeles, California, defendants William Jackson Shaw and Frank S. Tyler caused to be issued in the name of Regina Woodruff, certificate No. 741 for 30 shares of the capital stock of Consolidated Mines of California.

(8) On or about December 29, 1936, at Los Angeles, California, defendants William Jackson Shaw and Frank S. Tyler caused to be delivered to Pledger & Company, brokers, certificate No. 1035 for 28 shares of common stock of the Monolith Portland Cement Company, standing in the name of Perle Burns for the purpose of sale and remission of proceeds of such sale to the defendants, proceeds of such sale being subsequently received by defendants.

(9) On or about January 25, 1937, at Los Angeles, California, defendants William Jackson Shaw and Frank S. Tyler caused to be delivered to Pledger & Company, brokers, certificate No. 813 for 138 shares of preferred stock of the Monolith Portland Midwest Company, standing in the name of Thomas J. and Anna L. Allen for the purpose of sale and remission of proceeds of such sale to the defendants, proceeds of such sale being subsequently received by defendants.

(10) On or about April 24, 1937, at Los Angeles, California, defendants William Jackson Shaw and

Frank S. Tyler caused to be delivered to Pledger & Company, brokers, certificate No. 822 for 30 shares of preferred stock of the Monolith Portland Midwest Company, standing in the name of Mary Florence Claypool for the purpose of sale and remission of proceeds of such sale to the defendants, proceeds of such sale being subsequently received by defendants.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

BEN HARRISON,
United States Attorney,
WM. FLEET PALMER,
Assistant United States Attorney

[Endorsed]: Indictment. A true bill. A. M. Buley, Foreman. Filed Dec. 13, 1939. R. S. Zimmerman, Clerk. Bail, $5000. [81]

In the District Court of the United States, Southern District of California, Central Division

No. 14200-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM JACKSON SHAW, also known as W. J. SHAW, and FRANK S. TYLER,

Defendants.

PLEA IN ABATEMENT OF DEFENDANT WILLIAM JACKSON SHAW.

Now comes William Jackson Shaw, also known as W. J. Shaw, one of the defendants above named, hereinafter referred to as this defendant, and, as his first plea to the indictment herein, files this his personal Plea in Abatement to said indictment to the effect that he should not be prosecuted, punished or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing which may be, or is, presented, set forth or alleged in said indictment, and in this respect, alleges the following facts in abatement of said indictment, towit:

I

That on or about July 17, 1936, in the city of Los Angeles, County of Los Angeles, State of California, at Room 427, Bank of America Building, 650 South Spring Street therein, the (United States)

Securities and Exchange Commission (hereinafter referred to as the or said Commission) was proceeding with a hearing and investigation under the [82] "Securities Act of 1933," begun previously to *say* day, of the affairs and conduct of Consolidated Mines of California, a corporation, which said proceeding before said Commission was entitled, "In the Matter of Consolidated Mines of California," in the records and files of said Commission, and which said corporation was and is the corporation referred to by a similar name throughout the indictment herein.

II

That the said hearing and investigation before said Commission was at said time and place presided over and conducted by Milton V. Freeman, Examiner; that said Milton V. Freeman, Examiner, was the officer designated by said Commission to require and compel the attendance and testimony of witnesses before the said Commission and at said hearing, and said Milton V. Freeman, Examiner, was the officer designated by said Commission to require and compel the production of books, papers, contracts, agreements and other documents before the said Commission at said hearing.

III

That prior to said July 17, 1936, this defendant was requested to attend the said hearing before said Commission by said Milton V. Freeman, Examiner;

that thereupon, and on said July 17, 1936, at the time and place aforementioned, this defendant did attend said hearing in response to the request of said Commission. [83]

IV

That during the course of said hearing and at the hour of two o'clock P. M., or thereabouts, of said day, at said time and place and in said proceeding mentioned, this defendant was called before said Commission by said Examiner and was sworn and testified as a witness on behalf of the Government concerning the affairs and conduct then under investigation by said Commission of said Consolidated Mines of California, a corporation; that this defendant on said day and from time to time thereafter in said proceedings proceeded to answer questions propounded to him by said Examiner.

V

That the testimony given by this defendant before said Commission, as a witness on behalf of the government, related briefly and in substance to the following transactions, matters and things:

(a) The formation of the Stockholders' Protective Committee of Monolith Portland Cement Company and the connection of this defendant therewith and the connection of this defendant with the Consolidated Mines of California.

(b) The connection and relation between this defendant and members of said stockholders' Protective Committee.

(c) The valuation of the shares of the Monolith Portland Cement Company stock.

(d) The details of and the participation of this [84] defendant in organizing the Consolidated Mines of California.

(e) The details and participation of this defendant in the sale of the interests in the partnership and stock of Consolidated Mines of California to members of depositors of Monolith Portland Cement Company.

(f) The details of and the participation of this defendant in interesting members of said Stockholders' Protective Committee and depositors therein in the gold mining venture referred to as Consolidated Mines of California.

(g) The preparation of letters sent out to partners or stockholders in Consolidated Mines of California.

(h) The details of and representations made to stockholders of Consolidated Mines of California.

(i) Preparation of and authorship of letters sent to stockholders of Consolidated Mines of California.

(j) Relation of and influence of this defendant upon determining policies of Consolidated Mines of California.

(k) Relation and connection of this defendant to and with Frank S. Tyler and Henry L. Wikoff and W. J. Morgan referred to in the indictment herein.

That all of the transactions, matters and things above referred to, concerning which this defendant

testified at length, as aforesaid, were and are and each of them is the transactions, matters and things which is the subject matter of the indictment in the above entitled action. [85]

VI

That the United States Government has in its possession the testimony of this defendant at said hearing and has available to it all of the records and files of the said Commission, including the transcript of the testimony at the hearings before said Commission in connection with Consolidated Mines of California; that the testimony of this defendant covered the transactions, matters and things attempted to be alleged in this indictment as the basis of the prosecution of this defendant.

VII

That this defendant, having been requested to appear before said Commission and having testified, as above set forth, as a witness on behalf of the Government, he thereupon became and ever since has been entitled to be not prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he was compelled to testify or produce evidence, documentary or otherwise, ex*d*ept for perjury committed in so testifying; that notwithstanding the immunity of this defendant from being prosecuted or subjected to a penalty or forfeiture, as aforesaid, the indictment in the above entitled action consti-

tutes a prosecution of this defendant for or on account of the transactions, matters and things concerning which he was compelled to testify, as aforesaid. [86]

VIII

That this defendant has exercised diligence in presenting the within Plea in Abatement to the above entitled court, the same being his first plea to the indictment on file herein, subsequent to his arraignment thereon; that this Plea in Abatement is not filed for the purpose of delay in the progress of this case, but is presented to secure the granting of the Plea and the quashing of the indictment herein against this defendant.

IX

That the transactions, matters or things concerning which this defendant testified, as aforesaid, before said Commission, are the transactions, matters or things, the basis of each count set forth in the indictment in the above entitled action.

Wherefore, this defendant prays that this Plea in Abatement be granted; that the indictment in the above entitled action be quashed; that the indictment in the above entitled action be quashed as to this defendant; and that this defendant be discharged.

WILLIAM JACKSON SHAW
W. J. SHAW
Defendant
HAROLD C. FAULKNER
Attorney for Defendant [87]

State of California,
County of Los Angeles—ss.

William Jackson Shaw, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action and is the person named in the foregoing Plea in Abatement; that your affiant has read the foregoing Plea in Abatement and knows the contents thereof, and that the facts therein stated are true.

WILLIAM JACKSON SHAW
W. J. SHAW

Subscribed and sworn to before me this 8th day of April, 1940.

R. S. ZIMMERMAN,
Clerk U. S. District Court
Southern District of
California
By GEO. E. RUPERICH
Deputy

Receipt of a copy of the within Plea in Abatement of defendant, William Jackson Shaw, is hereby admitted this 8th day of April, 1940.

BEN HARRISON
United States Attorney
By WILLIAM F. HALL, Asst.
Attorney for Plaintiff

[Endorsed]: Filed April 8, 1940. [88]

[Title of District Court and Cause.]

DEMURRER OF DEFENDANT, WILLIAM JACKSON SHAW

Now comes the defendant, William Jackson Shaw, in the above entitled action and without waiving his right to hereafter plead not guilty, files this, his demurrer to said indictment, and for grounds of demurrer specifies:

I.

That the First and each and every count of said indictment fails to allege facts sufficient to constitute a public offense under the laws of the United States.

II.

That the First and each and every count of the said indictment fails to inform the accused of the nature and cause of the accusation against them in ordinary and concise language with such certainty as to enable them to understand the charges and prepare their defense to each and every charge contained therein, and that the First and each and every count in said indictment is, therefore, repugnant to the [89] Sixth Amendment of the Constitution of the United States.

III

That said indictment is duplicitous, and each separate count in said indictment, except the Seventeenth count, is duplicitous in this, that each of said counts (other than the seventeenth count) attempts to

charge the defendants with more than one offense in the same count, towit: A violation of Title 15, U. S. C. Ann., Sec. 77q(a)(2), and a violation of Title 18, U. S. C. Ann., Section 338.

IV

That in each count in said indictment, other than the Seventeenth count, there is a misjoinder of offenses in each thereof in the same particulars in which each count is hereinabove alleged to be duplicitous.

V

That said indictment in duplicitous and/or there is a misjoinder of offenses in said indictment in this, that sixteen separate offenses are attempted to be alleged in violation of said Title 15, U. S. C. Ann., Sec. 77q thereof; each of which is a repetition of the same offense, if any.

VI

That the first and each and every count in the indictment fails to state a public offense under the laws of the United States for the reason that the letters, reports or documents alleged in each respective count in said indictment to have been placed in the United States mails could not, nor could either of them, have been for the purpose of [90] executing any scheme or artifice to defraud sought to be pleaded in the indictment.

VII

That the said indictment as a whole is, and the First and each and every count therein are indefinite, ambiguous and unintelligible to such an extent that this defendant is not advised thereby of the nature of the charge against him so that he may properly prepare and submit his defense thereto.

VIII

That the First count in said indictment and each and every count thereof, which includes by reference any portion of the First count in said indictment, were, and are each thereof is, general, vague, indefinite, uncertain, ambiguous and unintelligible in each and every and all of the following respects: That in said First count in said indictment and in each succeeding count, which includes any portion thereof by reference, it does not appear therein nor can it be ascertained therefrom (the paragraphs hereinafter referred to are the paragraphs numbered in the First count in said indictment):

1. How or in what manner or by what means William Jackson Shaw controlled and/or dominated the Committee referred to in paragraph One.

2. Except from the legal conclusion of the pleader that William Jackson Shaw did control and/or dominate the [91] Committee referred to in paragraph One.

3. The time when said defendant devised or intended to devise a scheme or artifice to defraud as alleged in paragraph Three.

4. Where or at what place defendant devised or intended to devise the scheme or artifice to defraud as alleged in paragraph Three.

5. What period of time is intended to be covered by the word "before" used in line 18 of paragraph Three of said indictment.

6. How or in what manner the defendant could devise or intended to devise a scheme to defraud and/or to obtain money and property by means of false and fraudulent pretenses as alleged in said paragraph Three at the time of the mailing of each letter referred to in said indictment when it appears that said scheme, if any, and said false and fraudulent pretenses, if any, all occurred at a time long prior to the mailing of the letters referred to in said indictment.

7. Where the defendant did persuade or induce the depositors with the Monolith Committee to do any of the acts and things alleged in paragraph Four of said indictment.

8. The time or place of any of the occurrences as set forth in paragraph Four.

9. The time of the dissolution of the Committee referred to in paragraph Four. [92]

10. The time and place of performance of any of the acts or things claimed to have been done or performed as alleged in paragraph Five of said indictment, and each succeeding paragraph and subdivisions of said paragraphs, in the First count in said indictment.

11. Whether the defendant employed and/or caused to be employed the trust and confidence existing between the Monolith Committee and the depositors as alleged in said paragraph Five.

12. Except from the legal conclusion of the pleader and trust and confidence existed between the Monolith Committee and the depositors as alleged in said paragraph Five or as alleged in any other paragraph in said indictment.

13. How or in what manner the defendant could employ or cause to be employed the trust and confidence of depositors with other persons.

14. How "trust and confidence" can do the act of "persuading and inducing" as alleged in said paragraph Five.

15. How or in what manner defendant induced Morgan to write letters as alleged in paragraph Five.

16. Except from the legal conclusions of the pleader that the letters of Morgan encouraged the depositors to do any of the acts or things alleged in said paragraph Five.

17. Except from the legal conclusions of the pleader that defendant Shaw controlled either the Monolith Committee or the gold mining venture referred to in paragraph Six of [93] said indictment.

18. Whether defendant Shaw and Tyler did make the secret agreement referred to in paragraph Seven to said indictment.

19. Whether defendant Tyler did pay Shaw most of the money and property which Tyler received from any person referred to in said indictment.

20. How or in what manner any act alleged in paragraph Eight of said indictment could be part of the scheme and artifice referred to in said indictment when in paragraph Sixteen therein it is alleged that the same scheme and artifice was for the defendants to convert all of the moneys and properties received by them to their own use.

21. Whether the defendants did any of the acts which it is alleged they would do in said paragraph Eight.

22. Whether the defendants did or performed any of the acts which it is alleged in paragraph Nine of said indictment they would do.

23. What time and what place is referred to by the use of the expression, "then and there," in line 25 of paragraph Nine.

24. Whether defendants did any of the acts attempted to be alleged in paragraph Ten of said indictment.

25. Whether defendants did cause to be prepared the certain agreement which it is alleged they would cause to be prepared. [94]

26. Whether defendants did any of the acts attempted to be alleged in paragraph Eleven of said indictment.

27. Whether the defendants did do any of the acts alleged in paragraph Eleven that they would do.

28. Whether the defendants did do any of the acts alleged in Paragraph Twelve of said indictment that they would do.

29. Whether the defendants did do any of the acts alleged in said paragraph Twelve that they should do.

30. How or in what manner the defendants or any other person could devise a scheme to be conducted at a loss for the purpose of deceiving persons into believing that profitable mining operations were conducted.

31. Whether the defendants did do any of the things that it is alleged they would do in paragraph Thirteen of said indictment.

32. Whether the defendants did do any of the things that it is alleged they would do in paragraph Fourteen of said indictment.

33. Whether the defendants did do any of the things that it is alleged they would do in paragraph Fifteen of said indictment.

34. Whether the defendants did do any of the things that it is alleged they should do in paragraph Fifteen.

35. Except from the legal conclusion of the pleader that any of the acts alleged in paragraph Fifteen of said [95] indictment prevented any person from discovering the true status of the mining venture.

36. Except from the legal conclusion of the pleader how mnay of the acts alleged in paragraph Sixteen prevented any person from taking action to protect his rights.

37. Whether the defendants did make any of

the false and fraudulent pretenses referred to in said paragraph Sixteen.

38. The time and place of making any false or fraudulent pretenses, etc., referred to in said paragraph Sixteen.

39. The person or persons to whom any false or fraudulent pretenses were made as referred to in paragraph Sixteen.

40. Except from the legal conclusion of the pleader that any typewritten, multigraphed or duplicated letter contained false or fraudulent pretenses referred to in said paragraph Sixteen.

41. The time and place of making any representation alleged or attempted to be alleged in subdivisions (a) to (s) inclusive in said paragraph Sixteen.

42. Except from the legal conclusion of the pleader that a representation that Frank S. Tyler was an engineer meant that Frank S. Tyler was a mining engineer.

43. How defendants could intend to convert all of the funds as alleged in subdivision (g) of paragraph Sixteen to their own use when it is alleged in subdivision (f) that [96] only a part of the funds were to be converted to their own use, and when it is alleged in paragraph Eight of said indictment that part of the funds were to be used to purchase certain mining claims.

44. Except from the legal conclusion of the pleader that the representation alleged in subdivi-

sion (i) of paragraph Sixteen had the meaning alleged in said subdivision (i).

45. When or at what time the defendants knew the things alleged in subdivision (i) of said paragraph Sixteen.

46. Except from the legal conclusion of the pleader that the representation alleged in subdivision (j) had the meaning alleged in said subdivision (j).

47. Except from the legal conclusion of the pleader that the representation alleged in subdivision (k) had the meaning attempted to be alleged in said subdivision (k).

48. Except from the legal conclusion of the pleader that the representation alleged in subdivision (l) had the meaning attempted to be alleged in said subdivision (l).

49. Except from the legal conclusion of the pleader that the representation contained in subdivision (m) had the meaning attempted to be alleged in said subdivision (m).

50. How or in what manner the defendants knew or could have known the things alleged in subdivision (q) of paragraph Sixteen.

51. How or in what manner the defendants knew or [97] could have known the things alleged in subdivision (r) of paragraph Sixteen.

52. The time and place referred to by the expression "then and there" repeatedly used in each of the subdivisions (a) to (s) inclusive of paragraph Sixteen.

53. How or in what manner the letter referred to in paragraph Seventeen of the said indictment and the letter referred to in nine separate counts in said indictment could have been mailed for the purpose of executing the scheme and artifice referred to in said indictment or attempted to be ascribed therein.

IX.

That each separate count in said indictment numbered from One to Sixteen thereof is uncertain in that it is not ascertained therefrom whether an attempt is made to allege the violation of Title 15, U. S. C. Ann., Sec. 77q, or a violation of Title 18, U. S. C. Ann., Sec. 338.

X.

That it does not appear that any of the representations, pretenses or promises claimed to have been made in paragraph Sixteen of said indictment, or in any other portion of said indictment relating to the statements made or claimed to have been made by the defendants, were of a material fact.

XI.

That it does not appear that any of the representations, pretenses or promises claimed to have been made in [98] paragraph Sixteen of said indictment, or in any other portion of said indictment, relating to the statements made or claimed to have been made by the defendants, were misleading.

XII.

Count Seventeen—Conspiracy: That each of the preceding paragraphs is incorporated herein as a ground of demurrer to the Seventeenth count of said indictment as though each thereof was separately stated therein.

XIII.

That it does not appear in said count Seventeen of said indictment whether any of the acts or things alleged in lines 15 to 26 inclusive were done or performed during the continuance of the conspiracy therein alleged, nor does the time or place of doing any of the acts alleged in said part of count Seventeen appear therein.

XIV.

That as further ground of demurrer to each count in said indictment, said defendant specifies that Section 338, Title 18, U. S. C. Ann. has been repealed by the enactment of the provisions of Section 77q, Title 15, U. S. C. Ann.

XV.

That said indictment and each separate count therein attempted to be alleged is barred by the operation of Title 18, Section 582, U. S. C. Ann.

XVI.

That each separate offense attempted to be stated in [99] said indictment was and is barred by the Statutes of Limitations.

Wherefore, defendant, William Jackson Shaw, prays that this demurrer be sustained and that said indictment be dismissed and that this defendant be discharged.

HAROLD C. FAULKNER,
Attorney for Defendant,
William Jackson Shaw

Receipt of copy of the within demurrer admitted this 8th day of April, 1940.

BEN HARRISON
United States Attorney
By WILLIAM F. HALL, Asst.
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 8, 1940. R. S. Zimmerman, Clerk, By Geo. E. Ruperich, Deputy Clerk.

[100]

[Title of District Court and Cause.]

DEMURRER TO PLEA IN ABATEMENT.

The United States hereby demurs to the Plea in Abatement filed herein by defendant William Jackson Hall, on the following grounds:

I.

The Plea in Abatement fails to state facts sufficient to constitute a valid plea in abatement, in that no facts are stated therein from which it appears that said defendant was compelled to testify or produce evidence, documentary or otherwise, con-

cerning any transaction, matter, or thing which is the basis of this indictment, or otherwise.

II.

The plea in abatement fails to state facts sufficient to constitute a valid plea in abatement, in that it fails to state any facts showing that said defendant ever claimed any privilege against self-incrimination.

III.

The plea in abatement fails to state facts sufficient [101] to constitute a valid plea in abatement, in that it fails to state any facts to show that said defendant was compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documnetary or otherwise, with respect to any transaction, matter, or thing which is the subject of the present indictment, or otherwise.

Wherefore, plaintiff, United States of America, prays that this demurrer be sustained and that the said plea in abatement be denied.

Dated: April 29, 1940.

BEN HARRISON
United States Attorney
By WILLIAM F. HALL
Assistant United States
Attorney.

[Endorsed]: Filed May 2, 1940. [102]

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE PLEA IN ABATEMENT

To: William Jackson Shaw and Harold C. Faulkner, his attorney:

You and each of you will please take notice and you are hereby notified that on Monday, May 6, 1940, in the court room of Judge Leon R. Yankwich, Federal Building, Los Angeles, California, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, the United States of America, by Ben Harrison, United States Attorney, will move to strike the Plea in Abatement filed herein on April 8, 1940.

The motion to strike said Plea in Abatement will be made on the grounds set forth in said motion attached hereto, upon the records and files of the above entitled matter, the affidavit of Milton V. Freeman attached to said motion, and points and authorities in support of the motion to strike the plea in abatement, filed herein.

Dated: April 29, 1940.

BEN HARRISON
United States Attorney
By WILLIAM F. HALL
Assistant United States Attorney
Attorneys for Plaintiff,
600 Federal Building
Los Angeles, California.

[Endorsed]: Filed May 2, 1940. [103]

[Title of District Court and Cause.]

MOTION TO STRIKE PLEA IN ABATEMENT

Comes now the United States of America, plaintiff herein, by and through its attorneys, Ben Harrison, United States Attorney, and William F. Hall, Assistant United States Attorney, for the Southern District of California, and moves to strike the plea in abatement filed herein by defendant William Jackson Shaw, on the following grounds:

I.

The plea in abatement fails to state facts sufficient to constitute a valid plea in abatement in that no facts are stated therein from which it appears that said defendant was compelled to testify or produce evidence, documentary or otherwise, concerning any transaction, matter, or thing, which is the basis of this indictment, or otherwise.

II.

The plea in abatement fails to state facts sufficient to constitute a valid plea in abatement, in that it fails to state any facts showing that said defendant ever claimed any [104] privilege against self-incrimination.

III.

The plea in abatement fails to state facts sufficient to constitute a valid plea in abatement, in that it fails to state any facts to show that said

defendant was compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, with respect to any transaction, matter or thing which is the subject of the present indictment, or otherwise.

IV.

The Affidavit of Milton V. Freeman, attached hereto and by reference made a part hereof, discloses that there is no valid ground upon which a plea in abatement can be based under (a) the Fifth Amendment to the Constitution, in that no right or privilege of the defendant Shaw under the Fifth Amendment was violated in the taking of his testimony, or (b) under Section 22 (c) of the Securities Act of 1933, as amended (Title 15, U. S. C. A., Section 77v, subdivision (c), in that it appears that the defendant Shaw did not refuse to answer questions on the ground that they might incriminate him, nor was he compelled, after asserting his privilege, to answer questions or produce documents.

Said motion is based upon the records and files of the within matter, said Affidavit of Milton V. Freeman and Points and Authorities in support of Demurrer to Plea in Abatement and in support of Motion to Strike Plea in [105] Abatement.

Wherefore, plaintiff, United States of America, prays that said Plea in Abatement be denied.

Dated: April 29, 1940.

BEN HARRISON
United States Attorney
By WILLIAM F. HALL
Assistant United States Attorney.

[Endorsed]: Filed May 2, 1940. [106]

[Title of District Court and Cause.]

AFFIDAVIT OF MILTON V. FREEMAN

District of Columbia—ss.

Milton V. Freeman, being duly sworn, deposes and says as follows:

He is now and has been continuously since September, 1934, an attorney employed by the United States Securities and Exchange Commission, an agency of the Government of the United States. During the year 1936 said Securities and Exchange Commission having reasonable grounds to believe that the provisions of Sections 5 and 17 of the Securities Act of 1933 were being violated in connection with the sale of securities of Consolidated Mines of California, a corporation, directed that an investigation be instituted pursuant to the provisions of Sections 19(b) and 20(a) of said Securities Act of 1933. The said Commission, on June 9, 1936, designated the affiant as an officer to conduct such investigation and empowered the affiant, pur-

suant to Section 19(b) of the Securities Act of 1933, to administer oaths and affirmations, sub-
[107] poena witnesses and take evidence.

On July 17, 1936 affiant called the defendant in the above-entitled cause, W. J. Shaw, before him and said defendant appeared voluntarily and without subpoena. The said defendant W. J. Shaw was then duly sworn on oath by affiant, pursuant to the powers granted him by the Commission. After ascertaining the defendant's name and address the affiant advised the said W. J. Shaw concerning his constitutional privilege against self-incrimination in the following words:

> "At this time I must advise you that you may refuse to answer any question that I may ask you if the answer may tend to incriminate you or subject you to any penalty or forfeiture."

Thereafter, on said July 17, 1936, and also on July 20, 1936 and September 2, 1936, the affiant proceeded to examine the said W. J. Shaw concerning his connection with the affairs of Consolidated Mines of California and the Stockholders' Protective Committee of the Monolith Portland Cement Company. Said Shaw was at all times during the course of said examination represented by counsel. A stenographic transcript of said Shaw's testimony was taken.

At no time during the course of the said examination did the said Shaw claim his privilege against

self-incrimination although he was advised concerning his rights when first sworn, as above set forth, and was reminded of those rights on each subsequent day on which his testimony was taken. [108] Affiant did not intend to grant the said defendant Shaw immunity from prosecution and affiant did not then believe and does not now believe that immunity from prosecution was granted to the defendant or to any other person called by affiant during the course of said investigation. On the contrary the affiant made every effort to make clear to the defendant the existence of his constitutional privileges.

(Signed) MILTON V. FREEMAN
Washington, District of Columbia

Subscribed and sworn to this 27th day of April, 1940 before me.

(Seal)

(Signed) ELINOR B. JOHANSON
Notary Public

[Endorsed]: Filed May 2, 1940. [109]

At a stated term, to wit: The February Term, A. D. 1940 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 14th day of June in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

Matters heretofore submitted are now determined as follows:

The Government's demurrer to the Defendant Shaw's plea in abatement is hereby sustained and the Government's motion to strike the same is hereby granted.

The grounds are given in the opinion filed herewith.

The defendant Shaw's demurrer to the Indictment is overruled as to all counts except Count 17.

The defendant Shaw's demurrer to Count 17 of the Indictment is sustained. Leave to resubmit the matter to the Grand Jury is granted.

The defendant Shaw's demand for a Bill of Particulars is hereby denied. Exception allowed. [110]

[Title of District Court and Cause.]

OPINION

Appearances:

For the Plaintiff:

Ben Harrison,
United States Attorney
William F. Hall,
Assistant U. S. Attorney
Los Angeles, California

For the Defendant:

Harold C. Faulkner,
San Francisco, California [111]

Yankwich, District Judge.

On July 17, 1936, and prior and subsequent to that date, at Los Angeles, California, the United States Securities and Exchange Commission, through certain of its officers, was conducting under the authority of the Securities Act of 1933, 15 U. S. C. A. Secs. 77a et seq., an investigation into certain transactions involving, among others, the stock of the Consolidated Mines of California, a California corporation, operating in Calaveras County. In conjunction with the investigation, the Commission issued subpoenas directed to the corporation and its President and Secretary to appear, at the investigation, to be held on November 22, 1937, and there produce certain records of the company.

The corporation declined to respond to the subpoena. The Commission then applied to me, and I issued an order [112] directing obedience to the subpoena and requiring the production of the documentary evidence called for in it.

On appeal to the Circuit Court of Appeals for the Ninth Circuit, this order was affirmed. Consolidated Mines of California v. Securities & Exchange Com., 1938, 9 Cir., 97 F. 2d 704.

Prior to July 17, 1936, William Jackson Shaw, the defendant, was requested to attend the hearing before the Commission by Milton V. Freeman, the Examiner conducting the investigation for the Commission. Shaw attended the hearing, was sworn by the Examiner, and testified on July 17, 1936, July 20, 1936, and September 2, 1936, as a witness concerning the affairs and conduct of the Consolidated Mines of California, a corporation.

The matters to which he testified related to the subject on which an indictment was returned in this court on December 12, 1939, against Shaw and Frank S. Tyler. The indictment consists of seventeen counts. The first thirteen counts charge violation of the Mail Fraud Statute, 18 U.S.C.A. Sec. 338. Counts fourteen to sixteen charge violation of the Securities Act of 1933—the sale of securities for which no registration statement was in effect and no exemption for registration available. 15 U.S.C.A. Secs. 77e (2). The seventeenth count charges conspiracy. 18 U.S.C.A. Sec. 88.

The defendant Shaw has filed a plea in abatement. In support of it, he claims that, as he was compelled to testify [113] against his will to matters out of which the indictment later arose, he is immune from prosecution under the provisions of Section 22 (c) of the Securities Act of 1933 as amended, 15 U.S.C.A. Sec. 77v (c). The Government has demurred to the plea in abatement and moved to strike it.

The enactment on which the plea of immunity is grounded reads: "(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying."

No subpoena compelling Shaw's attendance was

issued. His own affidavits merely state that he was requested to and did appear in response to the Examiner's request.

The affidavit of the Examiner discloses the fact that [114] Shaw was represented by counsel at the time of his appearance, that a stenographic report of his testimony was taken, and that before testifying, he was informed concerning his constitutional privilege against self-incrimination in the following words: "At this time I must advise you that you may refuse to answer any question that I may ask you if the answer may tend to incriminate you or subject you to any penalty or forfeiture." He took the stand and gave testimony. These facts are not denied. If they were, an issue of fact might be created as to which the defendant would be entitled to a jury trial. Jones v. United States, 9 Cir., 1910, 179 F. 584.

There is no need for this.

For we can decide the matter on the admitted facts contained in Shaw's sworn plea. Nowhere is it averred that Shaw raised the plea of self-incrimination or claimed immunity by reason of it.

We need not dwell, at length, upon the rule against self-incrimination contained in the Fifth Amendment to the Constitution of the United States. It is one of the great fundamentals of our constitutional liberty. Its enactment is traceable to the experience of ages past when convictions were secured upon confessions extracted by bar-

barous methods. This privilege, like all others, is a shield made for the protection of the individual against the arbitrary power of those charged with the enforcement of the law. (See my [115] article "Lawless Enforcement of the Law", 1935, 9 So. Calif. Law Review, 1-20)

It being made for the protection of the individual, he is privileged to waive it. The waiver may be by direct action or by failing to act.

Despite certain general statements in older cases to the contrary, the accepted view now sanctioned by the Supreme Court is that a waiver takes place when a defendant, who is not under compulsion, stands silent and does not claim the privilege. Powers v. United States, 1912, 223 U. S. 303; Vajtauer v. Commissioner of Immigration, 1927, 273 U. S. 103, 113; United States v. Murdock, 1931, 284 U. S. 141, 148; and see: United States v. Skinner, D. C. N. Y., 1914, 218 Fed. 870; Johnson v. United States, 4 Cir., 1925, 5 Fed. (2d) 471, 476, 477; United States v. Lay Fish Co., D. C. N. Y. 1926, 13 Fed. (2d) 136; United States v. Greater New York Live Poultry Chamber of Commerce, D. C. N. Y., 1929, 33 Fed. (2d) 1005.

Enactments like Section 22 (c) of the Securities Act of 1933, (15 U.S.C.A. 77v (c)) by granting immunity, do away with the harm resulting from self incrimination under compulsion. Brown v. Walker, 1896, 161 U. S. 591.

When there is no compulsion, and there is a voluntary appearance, all grounds for the application of the guaranty [116] are gone. (Sherwin v. United States, 1925, 268 U. S. 369.) "The privilege of silence," said the Court in United States v. Murdock, 284 U. S. 141, 149, "is solely for the benefit of the witness and is deemed waived unless invoked." The individual character of the privilege and the scope of its protection speak for the wisdom of such an attitude.

As Mr. Justice Holmes said in Heike v. United States, 1912, 227 U. S. 131, 142; statutes of this character are "coterminus with what otherwise would have been the privilege of the person compelled." It is consistent with similar rulings arising under other constitutional guaranties.

Thus, proceeding to enter a plea, with knowledge of the nature of the charge and without a specific demand for counsel, is considered a waiver of the right to counsel. Cooke v. Swope, D. C. Wash., 1939, 28 F. Supp. 492; Cooke v. Swope, 9 Cir., 1940, 109 Fed. (2d) 955.

The right to a jury trial may be waived by conduct or inaction, in civil cases. (Bank of Columbia v. Okely, 1819, 4 Wheat. 235; Maytag v. Meadows Mfg. Co., 7 Cir., 1930, 45 Fed. (2d) 299; Prince Line v. American Paper Exports, 2 Cir., 1932, 55 Fed. (2d) 1053; Smith Engineering Co. v. [117] Pray, 9 Cir., 1932, 61 Fed. (2d) 687), although an express waiver is needed in criminal cases. See:

Patton v. United States, 1930, 281 U. S. 276; Irvin v. Zerbst, 5 Cir., 1938, 97 Fed. (2d) 257; Spann v. Zerbst, 5 Cir., 1938, 99 Fed. (2d) 336. And see: Jones v. United States, 9 Cir., 1910, 179 F. 584.

These rights are as fundamental in our scheme to give to the individual a domain of protection where the sovereign cannot enter as the right against self-incrimination. Rightly, all may be waived by him whom they seek to protect.

The demurrer to the plea of abatement is sustained and the motion to strike it is granted.

Dated this 14th day of June 1940.

LEON R. YANKWICH
United States District Judge.

[Endorsed]: Filed Jun. 14, 1940. [118]

At a stated term, to wit: The February Term, A. D. 1940 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 17th day of June in the year of our Lord one thousand nine hundred and forty.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause coming on for plea of defendant William Jackson Shaw as to each of the remaining

counts; R. E. Lazarus, Assistant U. S. Attorney, appearing as counsel for the Government; Harold Faulkner, Esq., appearing as counsel for the said defendant, who is present:

The said defendant waives reading of the Indictment, and pleads not guilty, and it is ordered that the cause be, and it hereby is, continued for the Term for setting for trial. [119]

At a stated term, to wit: The February Term, A. D. 1941 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 17th day of June in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable: Leon R. Yankwich, District Judge

[Title of Cause.]

This cause coming on for trial of defendant William Jackson Smith; Maurice Norcop and E. H. Law, Assistant U. S. Attorney, appearing as counsel for the Government; Defendant Shaw being present in custody; and B. A. Bell, Court Reporter, being present and reporting the testimony and the proceedings:

The Court asks if the defendant is able to proceed, and the defendant says he is, but is not able to hire counsel because he is a pauper, and that if the Court will appoint counsel he is ready to go to trial. The Court makes a statement and appoints C. C. Montgomery, Esq., as attorney for the defendant.

Report of Dr. Kersten is filed and the bond of defendant exonerated.

It is ordered that a jury be impaneled for the trial of this cause, whereupon the clerk draws the names of the following twelve jurors, who take places in the jury box, viz.: Adolf F. Schumacher, H. Haywood, Lloyd H. Smith, John K. Veeder, Geo. R. Hippard, E. Dick Badham, Eldon H. Richberger, Elisha J. Benton, Lewis Matthias, Geo. H. Daniels, Edw. A. Raulston, and Eugene M. Berger, who are examined *for by* the Court and by Attorneys Norcop and Montgomery, respectively, and passed for cause.

The Government waives peremptory challenge.

Adolf F. Schumacher is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon [120] the clerk draws the name of Leonard A. Bachman, who is examined by the Court for cause and by Attorney Norcop for cause.

The defendant accepts the jury, and the jurors now in the box are sworn as the jury for the trial of this cause, viz.:

The Jury

1. Leonard A. Bachman
2. H. Haywood
3. Lloyd H. Smith
4. John K. Veeder
5. Geo. R. Hippard
6. E. Dick Badham
7. Eldon H. Richberger
8. Elisha J. Benton
9. Lewis Matthias
10. Geo. R. Daniels
11. Edw. A. Raulston
12. Eugene M. Berger

The Court orders that two alternate jurors be selected and the clerk draws the names of W. Elmo Reavis and Eric D. Henschel, who are examined for cause.

Eric D. Henschel is excused on peremptory challenge by the Government and it is ordered that another name be drawn, whereupon the clerk draws the name of John F. Meredith, who is examined for cause by the Court and questioned by Attorney Montgomery.

W. Elmo Reavis is excused on defendant's peremptory challenge and it is ordered that another name be drawn, whereupon the clerk draws the name of Reuben F. Ingold, who is examined by the Court for cause, and is excused, and it is ordered that another name be drawn; whereupon, the clerk draws the name of Max H. Schumacher, who is examined for cause by the Court.

Max H. Schumacher and John F. Meredith being accepted as alternate jurors are sworn.

Reading of the Indictment is waived. [121]

* * * * * * *

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find the defendant, William Jackson Shaw, Not Guilty as charged in the 1st count of the Indictment, and Not Guilty as charged in the 2nd count of the Indictment, and Not Guilty as charged in the 3rd count of the Indictment, and Not Guilty as charged in the 4th count of the Indictment, and Not Guilty as charged in the 5th count of the Indictment, and Not Guilty as charged in the 6th count of the Indictment, and Not Guilty as charged in the 7th count of the Indictment, and Not Guilty as charged in the 8th count of the Indictment, and Not Guilty as charged in the 9th count of the Indictment, and Not Guilty as charged in the 10th count of the Indictment, and Not Guilty as charged in the 11th count of the Indictment, and Not Guilty as charged in the 12th count of the Indictment, and Not Guilty as charged in the 13th count of the Indictment, and Guilty as charged in the 14th count of the Indictment, and Guilty as charged in the 15th count of the Indictment, and Guilty as charged in the 16th count of the Indictment.

Dated: Los Angeles, California, July 9th, 1941.

EUGENE M. BERGER
Foreman of the Jury.

[Endorsed]: Filed Jul 9 1941. R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy Clerk. [122]

[Title of District Court and Cause.]

MOTION OF DEFENDANT SHAW FOR A NEW TRIAL AS TO COUNTS 14, 15 AND 16

Comes now the defendant above named and moves to set aside the verdict and grant a new trial as to Count No. 14 as to sale and delivery to Dr. Homer J. Arnold and Florence R. Arnold of a certain security, no registration statement being in effect as to said security, etc., on the ground that the evidence is insufficient to sustain that the defendant knowingly, unlawfully, wilfully, or feloniously caused such delivery to be made.

The defendant further moves to set aside the verdict and grant a new trial as to Count No. 15 as to the sale and delivery to Regina Woodruff of a certain security, no registration statement being in effect as to said security, etc., on the ground that the evidence is insufficient to sustain that the defendant knowingly, unlawfully, or wilfully, or feloniously caused such delivery to be made.

The defendant further moves to set aside the verdict and grant a new trial as to Count No. 16

as to the sale and delivery to J. C. and E. M. Goodrich of a certain security, no registration statement being in effect as to said security, etc., on the ground that the evidence is insufficient to sustain that [123] the defendant knowingly, unlawfully, or wilfully, or feloniously caused such delivery to be made.

The defendant moves to set aside the verdict and grant a new trial as to Count No. 14 on the ground that the verdict is contrary to the evidence, which shows that the defendant in good faith, believed that it was not necessary for a registration statement to be filed under the Securities Act of 1933, as amended, for delivery to be made.

The defendant moves to set aside the verdict and grant a new trial as to Count No. 15 on the ground that the verdict is contrary to the evidence, which shows that the defendant in good faith, believed that it was not necessary for a registration statement to be filed under the Securities Act of 1933, as amended, for delivery to be made.

The defendant moves to set aside the verdict and grant a new trial as to Count No. 16 on the ground that the verdict is contrary to the evidence, which shows that the defendant in good faith, believed that it was not necessary for a registration statement to be filed under the Securities Act of 1933, as amended, for delivery to be made.

Defendant further moves that the verdict be set aside and a new trial be granted on the ground of errors of law in the giving of instructions as to the

transactions covered by Counts 14, 15, and 16, as excepted to at the time.

CHAS. C. MONTGOMERY
Attorney for Defendant
William Jackson Shaw

[Endorsed]: Received copy of the within Motion this 11 day of July 1941.

WM. FLEET PALMER,
United States Attorney
By MAURICE NORCOP,
Asst. U. S. Atty.
for the Plaintiff.

[Endorsed]: Filed Jul 11 1941. R. S. Zimmerman, Clerk. By Louis J. Somers, Deputy Clerk. [124]

At a stated term, to wit: The February Term, A. D. 1941 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 11th day of July in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable: Leon R. Yankwich, District Judge

[Title of Cause.]

This cause coming on for sentence of defendant Shaw on counts 14, 15 and 16, and for sentence of defendant Tyler following plea of nolo contendere

on the 16 counts of the indictment; Maurice Norcop and Ed. H. Law, Assistant U. S. Attorneys, appearing as counsel for the Government; Chas. C. Montgomery, Esq., appearing as counsel for defendant William Jackson Shaw, who is present; Arch Ekdale, Esq., appearing as counsel for defendant Frank S. Tyler, who is present, and A. Wahlberg, Court Reporter, being present and reporting the proceedings:

Attorney Montgomery files motion for a new trial as to defendant Shaw and argues said motion, Attorney Sobieski of the Securities Exchange Commission replies, Attorney Norcop makes statement, and it is ordered that the motion for a new trial be, and it is hereby, denied. Exception noted. [125]

* * * * * * *

District Court of the United States, Southern District of California, Central Division

No. 14200 Y. Criminal indictment in 17 counts for violation of U. S. C., Title 15, Sec. 77q(a)(2); Title 18 U. S. C. Sec. 88, Title 18 U. S. C. Sec 338

United States

v.

William Jackson Shaw.

JUDGMENT AND COMMITMENT

On this 15th day of September, 1941, came the United States Attorney, and the defendant, William Jackson Shaw, appearing in proper person, and with counsel, and,

The defendant having been convicted on trial by jury of the offenses charged in the 14th, 15th & 16th counts in the above-entitled cause, to wit failing to register stock with the Securities and Exchange Commission sold outside of California.

Defendant was found not guilty on counts 1 to 13 inclusive, and demurrer was sustained to the 17th count, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the jail type to be designated by the Attorney General or his authorized representative for the period of six months on the fourteenth count of the indictment, and for the term of six months on the fifteenth count of the indictment and for the term of six months on the sixteenth count of the indictment and it is further ordered that the terms imposed on the fifteenth and sixteenth counts run concurrently, and also concurrently with the term imposed on the

fourteenth count. The total term of imprisonment herein is six months.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) LEON R. YANKWICH
United States District Judge.

Filed this 15th day of September 1941.

R. S. ZIMMERMAN
Clerk
(By) LOUIS J. SOMERS
Deputy Clerk. [126]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Name and address of appellant: William Jackson Shaw, Chase Diet Sanitarium, 1032 West 18th Street, Los Angeles, California.

Name and address of appellant's attorney: Charles C. Montgomery, 918 Pershing Square Building, Los Angeles, California.

Offense: Violation of Securities and Exchange Commission Act of 1933 by knowingly, unlawfully, wilfully, and feloniously causing to be delivered by the United States mails certain securities, to-wit:

certificates of the capital stock of Consolidated Mines of California, a corporation, no registration statement being in effect as to such securities and no exemption for registration being available.

Date of judgment: September 15, 1941.

Brief description of judgment or sentence: Judgment of conviction as to appellant who was sentenced to imprisionment for six months under *cout* 14, six months under count 15, and six months under count 16, the sentences to run concurrently, maximum sentence six months. [127]

Appellant has been at liberty under bail.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned on the grounds set forth below.

Pursuant to Rule 5 I hereby serve notice that I do not elect to enter upon service of the sentence pending appeal.

Dated: September 15, 1941.

WILLIAM JACKSON SHAW
Appellant
CHARLES C. MONTGOMERY
Attorney for Appellant

Grounds of Appeal:

1. There was no evidence to support a verdict of guilt on the part of this defendant and appellant under any of the Counts 14, 15 and 16, and the Court should have dismissed the matter at the close of the Government's case.

2. There was no evidence to support a verdict of guilt on the part of this defendant and appellant, and the Court should have dismissed the matter as to this defendant and appellant.

3. Error in failure to grant this defendant's motion for new trial.

4. Errors of law committed by the Court in the giving of instructions to the jury as to liability under the Securities Exchange Act, to which exceptions were duly taken at the time.

[Endorsed]: Received copy of the within Notice of Appeal this 15th day of September, 1941.

WM. FLEET PALMER,
United States Attorney.
By MAURICE NORCOP,
Assistant United States Attorney

[Endorsed]: Filed Sep. 15, 1941. [128]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

I.

The evidence is insufficient to sustain the verdicts and judgments. The record shows plain error on its face in holding that the evidence is sufficient to justify the verdicts and judgments. The evidence is insufficient in these respects:

1. The evidence shows that no stock certificate was mailed or transported in interstate commerce and that the mailing of the stock certificates was from one point within the City of Los Angeles to another point in the City Los Angeles.
2. The evidence of shipment of the stock is contained in the testimony of the following witnesses:

EVA M. GOODRICH

a witness for the Government, testified as follows:

Direct Examination

I live at 1336 West 47th Street, Los Angeles. On or about the 1st of June 1937 I owned some shares of stock in the Midwest Company. I traded them for Consolidated Mines. As to stock certificate No. 742 calling for 18 shares of Consolidated Mines of California which appears to be issued in the name of J. C. Goodrich and E. M. Goodrich, joint tenants, with full right of survivorship, which certificate is dated the 8th day of June 1937, and appears to be signed by Frank S. Tyler, secretary, and bearing, apparently, the rubber stamp signature of H. L. Wikoff, president. I received the stock certificate in this envelope through the United States mails, postage prepaid.

(Certificate and envelope offered in evidence.)

(Objected to on the ground that there is no foundation for it, no connection of Mr. Shaw with any deal of Mr. Tyler with respect to selling stock of this character.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 54.")

(Subject to reserved Motion to Strike.)

(There was offered a certification by the Securities and Exchange Commission that the stock of this company was neither registered with the Commission nor any exemption granted by the Commission to the registration of the same.)

Mr. Montgomery: We have no objection to the certificate as proof of the facts it states, but we object to any proof of the fact with respect to this defendant Shaw on the grounds heretofore stated, that he hasn't been connected with it.

The Court: Subject to that reservation the objection will be overruled and it may be received in evidence.

(The document referred to was received in evidence and marked "Government's Exhibit No. 55.")

(Subject to reserved objection.)

By Mr. Norcop:

"United States of America

"Securities and Exchange Commission

"I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D. C., which Commission was created by the Securities Exchange Act of 1934 (15 U. S. C. A., Sec. 78a et seq.), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchanges Act of 1934, do hereby certify that:

"A diligent search has this day been made of the books and records of this Commission, and the books and records do not disclose that any registration statement has even been filed with this Commission under the name of Consolidated Mines of California, pursuant to the provisions of the Securities Act of 1933 and/or the Securities Act of 1933 as amended.

"In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 13th day of May, A. D., 1941, at Washington, D. C.

"FRANCIS P. BRASSOR

"Secretary."

Affixed thereon, as you can see, is the seal in due course.

(Rep. Tr. p. 509, line 5 to p. 516, line 6.)

EVA M. GOODRICH,

further testified:

I owned some stock in the Midwest. I had 18 shares, and I received 36 of the Mines. After I made that exchange, that was when I received the certificate through the mail representing the 36 shares of Consolidated Mines.

(Rep. Tr. p. 917, lines 1-21.)

REGINA WOODRUFF

a witness for the Government, testified as follows:

Direct Examination

I have my stock certificate with me.

By Mr. Norcop:

Q. Now, this certificate which is photographed in the indictment, No. 741, for 30 shares is dated the 13th of May 1937, and did that come to you through the United States mails, Miss Woodruff? A. It did.

Prior to receiving this I had had a transaction with the Consolidated Mines of California. I talked with someone who was there and said he was Mr. Shaw. That was by telephone. I

called up the office and asked for Mr. Tyler. Most of the letters which I had received had been from Mr. Tyler, and I had called once or twice before and I asked for information and had talked with Mr. Tyler. I asked for Mr. Tyler and was told that he was no longer in the office, but that I might talk with Mr. Shaw, and that was the first time that I even knew that Mr. Shaw was connected with the thing at all. I hadn't had any information in regard to the Consolidated Mines for some time, and I wanted to know what was being done, and why, and just what progress was being made, and he assured me that everything was fine and that he was working without salary and he was hoping that the thing would be paying very, very soon because he wanted to be drawing a salary, and that he was quite sure that it would be paying us dividends and we would get our money back within a reasonable length of time; and he wanted me to convert my Midwestern stock into the Consolidated Mines, and he offered me—I had 30 shares of Midwestern, Monolith Midwestern, stock—and he offered me 60 shares for it. I think that is the substance of it.

I had a certificate for 30 shares of Monolith Midwestern, stock, and Mr. Shaw's offer was to give me 60 shares of this Consolidated Mines for that. I sent it in and I received through

the mails this certificate and I immediately called the office again and at that time I asked for Mr. Shaw and said that I had been told that I would receive 60 shares and had received only 30, and he said, "Well, that was a very serious mistake," and he would see that I got the other 30, which I did. (Certificate offered.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 77.")

I am a school teacher.

Cross Examination

I got another 30. I would be very happy to show it to you. My certificate is for the Monolith Portland. I had both common and preferred Monolith stock. I had 15 shares of preferred and 15 shares of common, both of which I had bought through Mr. Shaw's office quite a number of years ago, and that was converted over into this 123 shares. I don't know how much was for the common and how much for the other, because I got the one certificate and I don't know what the basis was there.

I reside in Los Angeles.

(Rep. Tr. p. 200, line 10 to p. 202, line 5.)

HOMER J. ARNOLD

a witness for the Government, testified as follows:

Direct Examination

As to this photostatic copy of a certificate of Consolidated Mines of California, numbered 732, for 250 shares of the stock of that corporation, dated the 14th day of December 1936, made out in the name of Homer J. Arnold and Florence R. Arnold, joint tenants with full rights of survivorship, and signed apparently Frank S. Tyler, secretary, and H. L. Wikoff, president—I received the original certificate of which that is a photostatic copy. Prior to receiving it, I was an owner of shares of the Monolith Midwest. In fact, I did have them in both. My stock in the Midwest was sold for $420 and the cash given to me. I had that transaction with Mr. Shaw. That was prior to the date that this certificate of mining stock bears. After that, I decided to put that money into the mine, the Consolidated Mining Company. Most of my talking was done with Mr. Shaw. I put $420 in cash into the Consolidated Mines of California, and then I suggested that if he would, I would like to make it a little more—Shaw was under my care for quite a period of time—say make $80 of it that he would take out in treatments, for a total of $500. Represented by the 250 shares, making

it $2.00 a share. Then I received, when the deal was finally consummated, through the mails, this stock certificate No. 732 of which this is a photostatic copy. I have that certificate.

(Rep. Tr. p. 918, line 1 to p. 920, line 17.)

HOMER J. ARNOLD

a witness for the Defendant, testified as follows:

Direct Examination

I testified yesterday afternoon with respect to certificate No. 732 for 250 shares made out to myself and wife as joint tenants.

Mr. Shaw had told me about it, the first time I heard of it, although I did see Mr. Shaw quite regularly. The first I had heard of it was when Mr. Morgan got my name, evidently from the committee list, and called about this transfer that some of them were making. But I didn't talk with him any further.

Then the next time I saw Mr. Shaw I spoke to him about it. He said he was keeping me in mind but he was waiting until things got a little further along before he said anything to me about it.

Mr. Morgan called me on the telephone. The time I discussed this with Mr. Shaw was some weeks or a few months prior to the month of December 1936. I think that was when I got the stock.

Mrs. Arnold was present at that conversation, outside of Mr. Shaw and myself.

At different times different things were said. It wasn't any one conversation, but it was about the general prospects of the mine.

He said that it wasn't a big mine, but what ore there was was running pretty high grade, around, as I remember it, $18; that if they could get a mill of about 25 tons on there it ought, in time, to turn out a reasonable profit. He did not tell me who else was in the deal.

I have known Mr. Shaw since 1924. He has been a patient of mine through that time, and besides that I have considered him a very good friend, and he has given me quite a little business advice from time to time.

I got cash for the sale of my Monolith,—$420. Then $80 was added to that for medical services. So that I put $500 in that proposition.

Mr. Shaw only told me about the deal, if I would invest it would have a very good chance of turning out quite a reasonable profit, and at any time that I wasn't satisfied, why, he would give me my money back. I never asked for my money back. I was never dissatisfied with his part of it.

I treated Mr. Shaw. I practice osteopathic work. I am blind.

At the time that Mr. Hughes and his partner —I have forgotten his name—first came out to talk to me about the—I think it was two years

ago this summer when they first came out—they wanted a statement at that time as to what our dealings had been, and then at a later time they came to me again. That is when they asked for the stock certificate, and I hesitated in handing it out—I don't know, I never cared to just turn loose on any certificate that I had, even if it was to a Government representative—and so I asked Mr. Shaw in the meantime—I told him that they were asking me these questions and wanted my certificate, and was it all right. And he said, "By all means. Go ahead and give it to them and give every cooperation and everything that they want to know. Don't hold back anything.

I let them have the certificate then, and I gave them a statement as to the best of my recollection. They took it and wrote it up and had me sign it.

(Rep. Tr. p. 1174, line 8 to p. 1179, line 21.)

II.

The Evidence Is Insufficient to Sustain the Verdicts and Judgments on Each Count in that the Evidence Was that the Stock Was Personally Owned Stock and There Was Therefore No Requirement to Register It Under the Securities Exchange Act.

III.

The Demurrer to Counts 14, 15 and 16 Should Have Been Sustained. The Indictment Fails to State an Offense as to Each of These Counts.

IV.

The Securities and Exchange Act, Inherently and as Construed and Applied in this Case, Is Unconstitutional, in Violation of the Fifth Amendment to the Constitution of the United States, in Requiring Registration of Personally Owned Stock.

V.

The Securities and Exchange Act, Inherently and as Construed and Applied in this Case, Is in Violation of the Fifth Amendment to the Constitution of the United States in that It Provides for a Different Rule or Regulation in the Use of the Mails Than It Does to Other Forms of Interstate Commerce.

VI.

The Securities and Exchange Act, Inherently and as Construed and Applied in this Case, Is Unconstitutional in that It Forbids the Free Use and Enjoyment of Personally Owned Property and Interferes with the Rights of the State to Regulate Its Own Securities.

VII.

The District Court Erred in Giving the Following Instruction, to Which an Exception Was Noted:

> "The Section of the Act which the defendant Shaw is charged with violating is Section 5(a)(2), which reads as follows:
>
> " 'Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly——

"'(2) To carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.'

"In determining whether or not there has been a willful violation of this Section, as alleged in Counts 14, 15, and 16, you must determine whether or not there was a registration statement in effect as to the shares of stock of Consolidated Mines of California, whether or not such securities were actually sold to the witnesses Goodrich, Arnold and Woodruff, or any of them, and you must further determine whether or not the defendant Shaw caused any of such securities of the Consolidated Mines of California to be carried through the mails for sale or for delivery after sale.

"The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant. The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned."

VIII.

The District Court Erred in Holding that the Statute of Limitations Did Not Apply to Counts 14, 15 or 16.

IX.

The District Court Erred in its Opinion, Decision and Determination in Overruling the Demurrer to the Indictment and Each Count Thereof.

X.

The District Court Erred in its Decision and Determination in Sustaining the Demurrer of the Government to the Defendant's Plea in Abatement.

XI.

The District Court Erred in its Decision, Determination and Order in Denying Defendant's Motion for New Trial by Jury on the Issue of Fact Raised by the Plea in Abatement.

XII.

The District Court Erred in its Decision, Determination and Opinion in Determining that it *Had and Had* Jurisdiction of the Offense.

Respectfully submitted,
MORRIS LAVINE,
Attorney for Apellant.

[Endorsed]: Filed Jan. 27, 1942.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

THOMAS J. ALLEN

a witness for the Government, testified as follows:

I lived at 3307 Harrison Street, Corvallis, Oregon, about 21 years. Mr. Frank S. Tyler alone called upon me in my home city about the fore part of 1936. I was at my recreation parlor at 134 South Second Street. We had a conversation and no one

(Testimony of Thomas J. Allen.)

else was present listening or participating. Mr. Tyler said he represented the stockholders committeemen on this Monolith stock that had been deposited, and asked me how many shares I held. I told him. He finally brought up the conversation relative to the fact that the Monolith stock was in bad shape and the committee was turning their stock other ways and wanted to know if I would turn my stock into mining stock. He said that it looked very good, looked like the surest way to get your money back that you had invested in the Monolith stock; that there would be no salaries paid to the officers of the mining stock until the stockholders of the Monolith got their money back; that they had the first choice in this and nobody else would have a chance at this mining stock except the stockholders committeemen that had put their stock on deposit with the bank. I asked him a few questions. I brought up the question what Mr. Morgan was doing with his stock. He said Mr. Morgan was going with the mining stock, with the committee stockholders. I said, "Put mine in, too. It seems there is no way to get any recovery from the Monolith stock."

He asked for my certificate of deposit of my stock at the bank. I went to my safety deposit box, but couldn't find it. I don't remember whether I ever received a receipt for the deposit of my stock. But I turned it in. He gave me a slip and said that if I was willing to turn my stock into the mining

(Testimony of Thomas J. Allen.)

stock, which he thought was best, that he would fix up the form that I would sign which would release my stock at the bank. He gave me this form and, to my recollection, that is about the transaction between me and Mr. Tyler. I had 138 shares of stock in the Monolith Cement Company deposited in the Pacific National Bank in San Francisco. There was no discussion as to valuation of the shares. Later I received a certificate for stock which I have with me.

(The document referred to was received in evidence and marked "Government's Exhibit No. 2.")

In March 1936 I received a document pertaining to the transaction.

(The document referred to was received in evidence and marked "Government's Exhibit No. 3.")

I have seen a document which seems to be a carbon copy of a letter, and my signature appears on there.

(The document referred to was received in evidence and marked "Government's Exhibit No. 4.")

I have seen what purports to be a part of a letter.

(The document referred to was received in evidence and marked "Government's Exhibit No. 5.")

(Read by Mr. Norcop)

(Testimony of Thomas J. Allen.)

(EXHIBIT No. 3

is, as you may see, a carbon copy on onionskin paper dated March 18, 1936. It states:

"Mr. Frank S. Tyler,
"634 South Spring Street,
"Los Angeles, California.

"Dear Mr. Tyler:

"In consideration of 138 shares of Monolith Portland Midwest Company preferred stock and no dollars cash, receipt of which you hereby acknowledge, you agree to deliver to me 138 shares of your personally owned stock of the Consolidated Mines of California.

"Yours very truly."

There is no signature, but on the lower left-hand corner is typed "Accepted by Frank S. Tyler.")

I signed this as an agreement. The letter was not written by me. I was under the impression that Mr. Tyler wrote it, but I don't know.

(Another carbon copy of a letter dated March 30, 1936, read by Mr. Norcop)

"Monolith Stockholders Committee,
"Los Angeles, California.

"Gentlemen:

"I hereby certify that I am the legal owner of the certificate of deposit representing 138

(Testimony of Thomas J. Allen.)

shares of the Monolith Midwest Cement Company stock deposited with the Pacific National Bank of San Francisco, California, under a certain depository agreement made through your committee.

"I further certify that this certificate of deposit has been lost and that I have made diligent search for it but have not been able to find same.

"I request that your committee obtain the release of the original stock certificate represented by the lost certificate of deposit, and I instruct you to deliver same to Frank S. Tyler from whom I have received value in full.

"I hereby agree that in the event I should find the certificate at some future date I will immediately forward same to your committee for cancellation. I further agree to hold you, Pacific National Bank or Frank S. Tyler harmless from any damage you may suffer through fraudulent presentation of the lost certificate of deposit.

"Very truly yours,

"THOMAS J. ALLEN."

Mr. Tyler stated that through the mining stock we would received our money back that we had invested in the Monolith Company, by taking stock in this mine. I paid $10 per share for my Monolith Midwest preferred.

(Testimony of Thomas J. Allen.)

Cross Examination

Mr. Frank S. Tyler saw me with regard to this exchange. I do not remember if I saw Mr. Tyler in 1935 before this transfer was made. I thought I had a certificate of deposit for the stock that was turned into the bank. When asked for it, I went to my safety deposit box, and it wasn't there. I signed the slip that I had lost my receipt for the stock. My stock was never lost. This is the document that I signed to release my stock to Mr. Tyler in place of my receipt, and if I am not mistaken, I signed another slip. Exhibit 4 is the one that I signed releasing my stock. The Monolith stock was fluctuating up and down. I don't know how much it was worth at that time. One day it would be worth $1.50, maybe a few days later the quotation would be $3; it was anywhere from $1.50 to $2, $3, along in there. It was never listed up there on the exchange that I ever seen. I haven't got those quotations from Mr. Morgan. I never had any transaction on a market, but there is a market for all stock at some price. I don't recall what Mr. Morgan quoted this stock as being worth. When I took this stock it was a gambling proposition and I lost, and I never paid any more attention to it.

I don't recall whether it was the Monolith Midwest or the Monolith Cement Company that I had my stock in. I checked this letter that I signed. That is evidently the stock that I had, for that is

(Testimony of Thomas J. Allen.)

what I traded, this Monolith Midwest. I don't know anything about the value of the Monolith Midwest at that time; only that it wasn't giving any dividends and they said it was in bad shape.

MILTON G. ALEXANDER

a witness for the Government, testified as follows:

Direct Examination

My occupation is designing and building of tool dies, jigs, fixtures, and special machinery. I came out here in September 1907 and lived here until June 1918 and returned again in about June 1932 and left about December 20, 1935. In 1918 I lived in Detroit up until about 1929 and then I spent about two and a half to three years in Pittsburgh. I went back to Detroit for about three or four weeks before I came out to California. Just immediately prior to June 1932 I was selling conveyors, speed reducers, and special machinery for the Palmer Bee Company. I had never been a salesman up to that time for securities. I have known W. J. Shaw since 1932, and I have known Frank S. Tyler since about the latter part of June 1918. W. J. Shaw's wife is my cousin, Edna Shaw. The same relationship exists to Frank S. Tyler. Mrs. Shaw and Mrs. Tyler are sisters. I contacted W. J. Shaw very shortly after I got here. W. J. Shaw lived at the Ocean Beach

(Testimony of Milton G. Alexander.)

Hotel at Ocean Park, or Ocean Park Hotel, I forget which it is, down there on the beach. I went out there quite often. Immediately after I came to California in June 1932 I was not exactly employed.

I had a conversation with W. J. Shaw at his home in June or July of 1932 in regard to employment, and Mr. Shaw suggested that I come to work for him. I knew Mr. Shaw's business was along the lines of securities. Mr. Shaw explained to me at that time that he had a stockholders committee that he thought I could get some employment from if I could go out and collect 50 cents a share from the stockholders. After several conversations which possibly lasted a course of three or four or maybe five weeks, Mr. Shaw made an appointment with me to come down to his office and to have a talk down there with he and someone else; I believe it was Mr. Griffith was there at the time, too. I recall going down to the office. I had a conversation there in the office with Mr. Shaw. I don't recall if anybody else was present during the conversation. The conversation was merely to inform me of what the function of the committee was—merely to collect 50 cents a share from the various stockholders of the Monolith Portland Cement Company and the Monolith Portland Midwest Company, for the propagation of a suit against Coy Burnett, I believe, and other defendants, in favor of the stockholders, and the reason for such a suit was misrepresentation of the sale of stock, misappropriation of funds, and a

(Testimony of Milton G. Alexander.)

few other counts that I don't recollect at the present moment what they were. My duties were to collect these funds at the rate of 50 cents per share and if the stockholders couldn't afford to put up 50 cents a share right then, we would take 25 cents a share; in 30 or 60 or 90 days they could pay the other 25 and make a total of 50 cents a share. And that was my entire duty. I would be working on a commission basis to collect those funds. I went to work for the committee at that time; and Mr. Shaw appointed a Mr. Griffith to have me go around with on two or three different calls so that I could become accustomed of how to approach the stockholders.

Prior to the time that I went out, I don't recall having a conversation with anybody other than Mr. Shaw in regard to my employment by this Monolith committee, unless Mr. Griffith might at that moment have had something to say about it. I don't know. The members of that committee were Mr. Harding, Mr. La Grange, and Mr. Morgan. Mr. Griffith was not of the committee to my recollection. I don't believe Mr. Shaw was except that I believe he was chief investigator. The only person who employed me to work for that committee was Mr. Shaw.

As far as instructions were concerned, I don't believe there were very many of those. However, there was a considerable amount of documentary evidence such as audits and various other forms of evidence against the Monolith directors or whoever were the defendants in that suit. It was all written

(Testimony of Milton G. Alexander.)

—they were all written items and they were studied over by me so that I could recite them to the various stockholders as absolute facts and if they were anything that we couldn't have the original of, there were photostatic copies made so we could have them with us to show to the stockholders. I was not given a complete list of the Monolith stockholders. I think we had a list of the stockholders in the office. If I was working in Los Angeles, we had a list of the Los Angeles stockholders in a certain section of the city. I believe Mr. Shaw or Mr. Griffith presented that list to me. In the majority of the cases, when I approached a stockholder, I collected the amount of money they could afford to put up at the moment or wanted to put up at that moment. The money was brought back into the office and given to Mr. Shaw. I worked for that committee from about August or September 1932 to December 1935. I was not a stockholder in the Monolith Corporation, the Midwest or the other. I did not own stock in either one of them.

After the death of Mr. Harding, I believe there was some re-arrangement of the officers there and I was made secretary of the committee. It was two or three or four months after I began to work, in August or September of 1932. I owned no stock in the corporation at that time. I can only say that as I recollect it that Mr. Shaw made me secretary of the committee. I don't know who did, but Mr. Shaw informed me I was secretary. My duties as

(Testimony of Milton G. Alexander.)

secretary merely were to sign documents. We did have some meetings. The documents that I was supposed to sign were presented to us at the meting or we made them up in the minutes. I don't recall exactly how that went. They were generally presented to me in the office. Mr. Morgan and Mr. La Grange right at the beginning there, and myself and Mr. Shaw, we were always in the meetings together whenever they had any. I believe my compensation for collecting the 50 cents from the stockholders for each share of stock was, at the beginning, 30 per cent. The only thing I received was the commission on the amount of money that I collecter from the stockholders. I received nothing for being secretary.

After the suit was completed, Mr. Shaw—I believe it was Mr. Shaw, gave me a bonus block of stock for collecting considerable funds for the Company. I believe it was the Midwest Company. The number of shares is beyond my recollection. I am pretty certain, 400 shares. I had been working for the company about three years at that time. I don't ever recall having physical possession of the stock certificates, that is, to take them out of the office. They were in the office. The certificates were made out to me, I am pretty certain. They were in the safe.

The first time that I heard anything about the mining enterprise, was somewhere just prior or just after the lawsuit. Frank S. Tyler was not in

(Testimony of Milton G. Alexander.)

California when I came here in June 1932. I was here about a year and a half before he was here. I can only recall the start of the mining enterprise. It was shortly after the Monolith lawsuit was completed.

Later I began working for this gold mining enterprise known as the Tyler agreement. I was working on the Tyler agreement toward the end of 1934. I remember calling upon a Mrs. Mary Craig in the latter part of '34. Mr. Tyler was in California when I began to work on this gold mining enterprise. I recall a conversation with Mr. Shaw in regard to this gold mining enterprise, in regard to my going to work for it. That conversation took place in the new offices of the Banks-Huntley Building, 634 South Spring Street. I don't recollect if anybody else was present. It was approximately in the latter part of '34. He informed me that there was information regarding some gold mining property up here up north there and that it might be possible for me to make some money on that deal. It was more or less relative to the transfer of the Monolith stock to the mining venture, because after the period of the stockholders committees' suit against Coy Burnett and other defendants, Coy Burnett was still at the helm of the Monolith Company, and we didn't feel that possibly that would be the right place for the stockholders to be. I believe Mr. Morgan was in operation as well at the time and I guess it was a period of 30 to 60 days before we went out

(Testimony of Milton G. Alexander.)

on the road. Several conversations were held and the substance of it is very vague in my mind. It doesn't occur to me that I worked for the gold mining enterprise. I was working for the committee. I was working, to a certain degree, in the interests of it, but mostly to the interests of the committee. I received pay on commission on the committee and then I also received what I might call a dole from Mr. Shaw for doing some favors for him, and it seemed like later on on the gold mining venture there was some commission of some kind in there. I can't tell you definitely, because I don't have that at my fingertips. Most of my instructions were given to me by Mr. Shaw. I don't recollect whether I went out first on this Tyler agreement alone or whether Mr. Tyler went with me. But I know my duty when I was on the road was to explain to the stockholders that were on the committee just what we had done—what we had accomplished—for the stockholders through a lawsuit. I believe we sued for several hundred thousand dollars and got something like $280,000 back for them through various funds.

It was to go out and explain our accomplishments to the stockholders, and then to tell them about this mining venture that we planned on taking the stockholders in with us on a partnership agreement with Tyler. At the time I first went out, I had with me what is known as the Tyler agreement. At that time I was personally acquainted with a large number of the Monolith stockholders. I had called upon,

(Testimony of Milton G. Alexander.)

I would judge, about 2500. In regard to the gold mining enterprise, I called upon the stockholders that I had previously called on and knew. At the time that I went out, I took with me a document known as the Tyler agreement. It was either at this period or later on that I did that. I know I had it in my possession at one or two times. In most cases, I believe I read it to the Monolith stockholders.

(Plaintiff's Exhibit 6—A copy of the Tyler Agreement introduced.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 6.")

At the time I took this Tyler agreement out, there were Monolith stockholders who had signed this Tyler agreement. Mr. Morgan's name was on it, and at that time I had transferred the stock that Mr. Shaw gave me into the Consolidated Mines of California and my name was on it. I began to go out and work for the Tyler agreement, or the gold mining enterprise about March 15, 1934.

When I went out on the road to visit these stockholders of the Monolith, Mr. Shaw gave me instructions. I remember calling upon Mary Craig and her husband, William L. Craig. The conversation that I had with them is about the same as I had with everybody else. It was a general sales talk that I made to all. I believe I was alone on the first visit,

(Testimony of Milton G. Alexander.)

and I believe Mr. Tyler was with me on a second visit. The first visit and the second visit were from 60 to 90 days apart. I know that shortly after Mr. Tyler came to California he went directly up to the mines and lived up there in Jackson. I went to Mr. and Mrs. Craig and explained to them that we were on the right track. In other words, we had accomplished something for the shareholders and we were very much interested in keeping together and continuing on.

I reviewed the entire status of the situation from the time we started until we completed the lawsuit, and then explained to them that we had taken over a mine up in Jackson or Calaveras County, and a good number of the shareholders were turning in their stock for a certain value, that value to be applied against the purchase price of stock in this mining venture, and also explained to them that several of the stockholders had done that, that I had done it with the four hundred shares I had, and that Mr. Morgan had done it with the shares that he had, and suggested that they do the same thing, I believe. If that Tyler agreement was in my possession on that day, I either showed it to Mrs. Craig or read it to her. I read to any stockholder that we had, because, as I recollect, they had to sign that Tyler agreement, the partnership agreement, and that was in a long form, and on the back of the Tyler agreement there were several pages of lines about triple spaced which every shareholder

(Testimony of Milton G. Alexander.)

had to sign to make them a party of the agreement, together with the number of shares they turned in and, if any cash, how much. When I approached a shareholder who wished to make the transfer from the Monolith Corporation over to the gold mining enterprise, I would have them sign on the Tyler agreement.

I called on the Craigs towards the latter part of September or October of 1934.

I signed my Monolith stock about the 15th of March, 1934. It is my recollection that from that date on that I carried the Tyler agreement with me when I visited these shareholders. When I did have the Tyler agreement with me, and the shares were transferred, they would sign the Tyler agreement at that time. I told these transferees what the money was going to be used for when the Monolith stock was turned into cash. I told them that we had the plans for building a mill on the property for milling, of 12 tons a day; that as soon as we could get sufficient funds together that was what we were going to do with the money; and also to develop the mine; that we were drifting a certain amount of feet a day, and that that money was going for the purpose of drifting those tunnels. I also told them how much we had drifted already. We had an expert report. We had a map of the property drawn by Sam Shaney. The map was brought out showing how far the tunnels had gone in, how far up we had driven the tunnels or drifts, and showed

(Testimony of Milton G. Alexander.)

them the width of the vein, the various points. And we had an assayer's report showing the value of the ore. That information was given to me by Mr. Shaw. I recollect telling the people approximately how much a mill like that would cost. It seems faint in my mind that we did have a figure; that we were going out to collect to put the mill and mine in operation. I did have a conversation with the Craigs as to how rich that gold mine was, just like I had with anybody else. That information was taken directly from documentary evidence that I had in my pocket. It showed assays.

I stated this morning after Mr. Harding's death that I became secretary of the Monolith committee. Mr. Harding was one of the officers of the committee. I don't know whether Mr. Harding was a member of the committee or not, because it was just shortly after I came on to the committee that Mr. Harding deceased. After I became secretary of the committee, when there were any documents or things of that nature I would sign myself, and I believe Mr. Griffith was on it at the time, too. The documents that I signed as secretary of the committee—I think it was only myself signed. I don't believe I ever was a director of the committee. As far as I know I was only secretary. However, I did sit in the stated meetings and at those meetings I remember Mr. La Grange was there and myself, Mr. Griffith, and Mr. Shaw. At the time I made this

(Testimony of Milton G. Alexander.)

switch of my Monolith stock into the gold mining stock, I paid no cash of my own, but I believe there was some cash put up for me by Mr. Shaw. I have no recollection of the definite amount. On my first visit with Mrs. Craig, I remember making statements to her in regard to the value of the mine; whether there was so much ore blocked out. I remember very distinctly making those remarks to most every stockholder that I called upon. There was several hundred thousand dollars' worth blocked out. That figure was amassed by the certain number of tons of ore that was in the mine and the assay of it that we received from the various assayers offices, and those figures were figured out by myself. Those reports were acquired by the office—the reports were made out by Sam Shaney and Rita Sampson, and the assays I couldn't tell you who they were made out by, but it only took a matter of arithmetic to multiply the value per ton by the amount of tons. I believe it was either Mr. Morgan or Mr. Shaw who gave me those documents. I don't believe there is a stockholder that I called on that didn't mention something about dividends, so I guess Mrs. Craig did too. I recall mentioning to her that providing we could mill 12 tons of ore a day over a period of time, we figured out how much per ton that would be and figured out how long it would take to pay off the mill and the mine and the operation of it, and then after that I believed in my opinion that we would pay dividends. I said

(Testimony of Milton G. Alexander.)

that providing the mine panned out as we anticipated it to pan out it would take a certain length of time to pay off the mine or to get even with the boards again and from then on it looked like it might be eight months to a year. I don't recall if anything was said to Mrs. Craig in regard to the value of the mill run ore that they were taking out of the mine at that time. I explained to all of the stockholders and Mrs. Craig included that it was nacessary to take a certain amount of country rock out in order to catch the vein unless the vein happened to be the full width necessary for the tunnel which should be approximately three or three and a half feet, maybe four. There might have been as many as a thousand of these shareholders of the Monolith that I contacted and talked to in behalf of this gold mining enterprise. I was working on the gold mining enterprise about 18 to 20 months. I have no idea how many shares of gold mining stock I traded. The Monolith preferred, I believe, was at that time somewhere around two to four dollars. I really couldn't tell how many shares I took in in total value. I recollect that the switching was done on a sort of a commission basis; however, while I was working both on the committee during the period of idleness and also back on this mining proposition and several other different propositions, I can't remember just exactly how I was paid on each and every deal. It is likely that I was paid on a commission basis, but I can't recall the com-

(Testimony of Milton G. Alexander.)

mission. I don't recall, because I do know there were two or three different percentage commissions paid on the committee deal and then I know I went out just for sort of a nominal remuneration on some other work I did for the office, and I also recall going out on some of this stock proposition on the gold mining, it seems like, on a commission basis. I don't remember whether it was that or just a certain amount per month or per day or per week, and expenses. At the time I was working for the Monolith and the gold mining enterprise, from 1932 to 1935 December, I would imagine through that period I was paid some $18,000 to $20,000. That included also the expenses on the road. What I mean to say is, I had to pay my own expenses on the road which amounted to some $85 to $90 a week in average. I don't recall the payor of the checks that I received. It was given to me in Mr. Shaw's office, by Mr. Shaw or Mr. Morgan. I don't think Mr. Morgan gave me very many of them. I know Mr. Shaw gave me quite a few of them. When I was contacting the shoreholders, I did not mention Mr. Shaw's name. I told them their stock would be sold at the market figure, anything we could possibly get out of it, and that the proceeds from the sale of that stock would go to propagate the mining enterprise, both in wages to the miners and superintendents, and the building of a mill, and anything pertinent to the operations of the mine. I don't believe I ever said

(Testimony of Milton G. Alexander.)

anything as to whether or not any of the money would go to any of the directors or other promoters; but I did tell each and everyone emphatically that asked me if I was doing this for nothing myself, and I told them no, I was getting paid for my services. There was nothing said about the pay of anyone else that I recall. The first trip that I made out in behalf of the gold mining enterprise, I was by myself, later I went out with Mr. Tyler for several months. I would judge I contacted about three or four hundred Monolith stockholders with Mr. Tyler. Before I went out with Mr. Tyler I did have conversations with Mr. Shaw in the Banks-Huntley Building. Various people at various times were present, Mr. Shaw, Mr. Morgan, Mr. Tyler and myself. The conversations just prior to the time Mr. Tyler and I went out on the road took place a considerable amount of time after I went out on the road myself. I went out on the road alone in March of '34, and at that time Mr. Morgan and Mr. Shaw gave me instructions. Then when it come time for Mr. Tyler to go out on the road with me, at the beginning of 1935, I was instructed how to handle the situation. I was to go out and contact the stockholders and give them the information of the committee's activities; also what we had done with the Tyler agreement, and then introduce Mr. Tyler to the stockholders and he would carry from there on explaining about the mine, about the activities of the mine. These were stockholders I had contacted be-

(Testimony of Milton G. Alexander.)

fore and knew personally, while on the committee, and some also I contacted on the Tyler agreement. I don't recall telling Mrs. Craig that our activities were limited to Monolith stockholders, other than Mr. Tyler and myself making these switches from the Monolith over to the gold mining. I remember just one instance. That was a man by the name of Buroll and a team mate, Mr. Nickles. We came in and explained that we ran into this factor in the office, and it was remedied and rectified right away. I know nothing about that team. We took that up with the office. We talked to Mr. Shaw, and I think Mr. Morgan was there, and they withdrew them immediately. Whether they were authorized to go in the field or not, I don't know. Mr. Tyler was up in San Francisco with me at the time this happened, or San Jose, or some place in that section. I had no conversation with Mr. Tyler as to who put these men in the field. I had no conversation with him, as far as whether he was authorized to do it or not. We were just both of the opinion that it was the wrong thing. We were out together, and had been out together for some time. I quit working for the Monolith and the gold mining enterprise December 18 or 20, 1935. At that time I went to Detroit. At the time I made the switch of my Monolith stock over into the gold mining enterprise, I got something like 1057 shares of stock assigned to me at that time. They were kept in the office, the same as the Monolith stock was. I didn't take these back to

(Testimony of Milton G. Alexander.)

Detroit with me. I do not still own those shares of stock. They were sent to Detroit to me with instructions to sign them and send them back, and that is what I did. It seems like there was a letter accompanying them, because I wouldn't have signed them and sent them back. I don't recall who the letter was signed by. I received nothing at all for the stock. I hadn't paid anything for it. It was Bonus stock. I did not lose anything.

While out on the road I did not have an expense account. I paid my own expense from the commissions I made on the committee deal and whatever money was handed to me I paid my own expenses. I never turned the expense account in to anybody else because I was responsible for that. I received a check, I believe, every Saturday at the hotel I was going to be for a certain amount of money that was an advance on my commissions. I don't recall who would sign them, but they came from the Los Angeles office. I don't know who the payor was at all. I can't recall whether it was Monolith Stockholders Committee or Consolidated Mines of California or W. J. Morgan or W. J. Shaw. It is possible that when I called on Mr. and Mrs. Craig I took some ore along with me that I had picked up at the mine. I had been up to the mine a few times and picked up some samples. It is hard to recollect whether I had any ore with me on that occasion or not. I have been out to the mine. I never had any mining ex-

(Testimony of Milton G. Alexander.)

perience. What I knew about this mine was what information I had received from the boys up at the mine there that were operating it. They gave me a little hint there and here and common judgment and good sense made me follow it. What I told people about the mine is what I myself observed and what people who were on the premises told me about the prospects, besides the reports from the mining engineers and the assayers and so forth. I was not told to pick any samples any particular place and take along. When I went out I picked up certain things that looked likely to me and took along to show the prospects. On this dividend proposition, too, I was told very definitely not to say anything about dividends to the stockholders, make no promises whatsoever. It was very emphatically emphasized upon me that I shouldn't say anything that would be a misrepresentation. When Tyler and I started out on the road, I took a sales kit with me. They were prepared by the office. I imagine either Mr. Morgan or Mr. Shaw prepared them. They were made up of reports from the mining engineers and assayers, together with the kit that I had already had on the stockholders committee, and I kept adding to that kit as the trials and information came through, all the way from the beginning of the year 1932 when I came out to work on the job. I had that kit prepared myself. I kept it well up to date. It was a letter kit that folded up in a letter

(Testimony of Milton G. Alexander.)

size, and I would have my papers and fold them and place them loose in the two sides of the letter.

Cross Examination

I came out to California in 1932. I saw Mr. Shaw, my cousin's husband, at that time. He and I discussed the matter of my obtaining employment. It seems the Monolith Stockholders Protective Committee was already in existence, and that originally was formed by a man by the name of Russell Griffith. I recall meeting him down on the beach there with his wife. The Monolith Portland Cement Company had its place up near Tehachapi. Then there is the Monolith Portland Midwest in Laramie, Wyoming. That is two committees there. I am pretty certain they had the same directors. Stockholders suits in both cases were contemplated. The first suit that was tried was tried on the Monolith Portland Cement Company at Tehachapi, and after that suit was completed it seems like the stockholders in the Midwest Committee were rather put out because they didn't receive direct benefits from that suit. So they wanted their own suit. The finances of the committee were pretty well expended at that time. Just how that went, I don't know. I think Haight, Trippett & Syverson were the attorneys on the Monolith Portland Cement suit. It seems like Mr. Shaw, or the committee, brought some kind of a suit against that law firm for re-

(Testimony of Milton G. Alexander.)

covery of *some kind of suit against that law firm for recovery of* some of the funds that were expended. Around $80,000 was gotten back for the Midwest shareholders for their suit. There were various attorneys—there was Giesler, and probably Mr. George Hatfield. Also Mr. Silverberg was implicated. I remember Earl Daniels, too. I don't know which of these attorneys were sued, but I recollect something of that nature. I do remember during that period there was money obtained. It was loaned to the committee for the continuance of it, however, and it wasn't gotten from the stockholders. It seems like Mr. Shaw got ahold of it some way or other. He put up some money to keep the committee running. He was chief investigator. He dug up an awful lot of information on Coy Burnett and the Monolith Company proper that went in eventually to make up counts on the complaint, and he eventually caused the recovery of something like $280,000 in the Monolith suit, and there was something about a four or five or six thousand dollar misappropriation of funds by Coy Burnett that he dug up. He had auditors Lybrand, Ross Bros. & Montgomery employed. I remember him guaranteeing the bills of Lybrand, Ross Bros. & Montgomery, amounting to several thousand dollars; I imagine ten or twelve thousand dollars. Then there was another firm of auditors, too, that came a little bit later than that. Thomas & Moore, I believe it was.

(Testimony of Milton G. Alexander.)

I was introduced to Mr. Griffith down on the beach on a couple of occasions. I can't remember whether it was Mr. Griffith or Mr. Shaw that hired me. Mr. Shaw was chief investigator for the committee. There was some trouble there. Shortly after I came here to work for the committee there was a shake-up in the committee, and it seems like Shaw took over the operation from Griffith. I interviewed about 2500 stockholders, and about a thousand when I started in on the new deal. I have talked to all of the stockholders in the same manner, and the faint recollections that I have of those past years have come back to that extent. At the moment I got into California, I got into the committee through Mr. Shaw. Who hired me is problematical; I don't know. I am still a little indefinite as to where the checks came from. It seems that I was paid by the committee. There was some kind of a suit instituted and tried before, I believe, Judge Shinn, and at that time I recollected and read very distinctly what the case was. You will find my statement there under oath. That case was a matter between the committee and A. R. Griffith. I am not certain of that. I am pretty certain that the one that was tried before Judge Shinn was to recover $1,280,000 against Burnett and others. I obtained quite a number of subscriptions for the committee to bring this lawsuit against Burnett and others. I believe I received the majority of them. A good share of the money collected went for attorneys' fees, and a

(Testimony of Milton G. Alexander.)

great portion of it went for payments on the auditor's fees, and a good portion of it went to myself and the other collectors of the funds, office expenses. The stockholders got some back. After the suit they returned some funds. 85 percent of the money they had advanced sounds like the figure. They recovered judgment in that suit about the latter part of '33. After that I waited around for quite awhile wanting something to do, and I kept hitting Mr. Shaw for another deal to go out on, and he told me that he had two or three or four in the fire, that he didn't know what he was going to do, but stick around. This gold mining deal came up eventually. The Tyler partnership agreement was first made up just prior to the time I went out on the road, February or March of '34. To begin with Mr. Morgan, Mr. Wikoff, Mr. Marquis, and myself signed up. I think Edna Shaw was on it. That is Mr. Shaw's wife and my cousin. She must have had some stock. I don't think my other cousin, Mrs. Tyler had any. I don't think Mrs. Morgan had any. It was Mr. Morgan—he had some 800 or 900 shares of stock, besides, it seems like, a check for $1,057. It seems like I had a photostatic copy of that check. It was the natural way to show the stockholders how to come into it, a sales point. Mr. Morgan was in the office at the time I received a copy of that check. I think he is the man that handed it to me. Mr. Morgan owned the Maricopa

(Testimony of Milton G. Alexander.)

mines at one time, and he was supposed to be the mining man that was familiar with mines. We discussed mining considerably, Mr. Morgan and I. Sam Chaney and Reed Sampson were the engineers whose reports I had. Reed Sampson was a state mining engineer at that time. I suppose the matter of this mine was submitted to them for investigation and report, because we got reports from him on it. I made a trip to the mine with Mr. Sampson. I was on the road two days with Mr. Sampson. We went up there and he had some other State work to do on that trip and I remember stopping at the Whisky Mine on the way back. What his duties were at that moment, I couldn't tell you. I didn't go up with Mr. Chaney, but I know he went up there on two or three different occasions right at the beginning. I believe he went up before Reed Sampson went up. I know he made one and possibly two reports. In fact, he was the man who drew up a map of the property. Those reports were explained to me by him and Morgan and Shaw. We all went over them together; Tyler. Right about that time Shaw took sick and went to the hospital. He was sick for an enormous long time. He conducted the business from a phone in his room there. Whether that was the beginning of the mining proposition or afterwards I can't recollect. He always had diabetes and he had heart trouble too. He had to be in bed a lot longer than I would like to be. While he

(Testimony of Milton G. Alexander.)

was away during the mining enterprise, Mr. Morgan was in the office most all of the time so we could discuss the matter with him at that time. I explained to the stockholders what was to be done with the money that they contributed to the mining deal and with the stock that they turned in on this partnership agreement. It was going to the propagation of the mine, for operating the mine, for the building of a mill, for paying my commission or salary, for collecting the funds. I presumed the money and stock belonged to the partnership. Exhibit 6 is the partnership agreement made and entered into as of the 6th day of February 1934, between Frank S. Tyler of Detroit, Michigan. I knew him back in Michigan. Mr. Tyler mentioned to me on several different occasions, that he planned for his own benefit in the venture to raise some funds from some friends back in the Detroit area. I undoubtedly explained the agreement to the stockholders. The funds were supposed to go for developing the mine and putting up the mill and so forth. There was a mill of that sort built on the premises, and there was considerable development work that was done there. Several hundred feet of tunnel was drifted. I think there was three or four or five men working there. There was a stope drifted. I don't know how many feet of that. I know it went up quite a ways to reach another vein that was some several hundred feet above. I know Mr. Tyler never

(Testimony of Milton G. Alexander.)

raised the funds that he thought he could raise. I do know that Tyler told me that he could get some funds in Detroit and I know that finally he couldn't get them. I don't know anything about what happened from the time I left California until I got back. My recollection is that as we went out and tried to get these stockholders to come into the partnership agreement we also at the same time told them that should we get sufficient funds in, we would incorporate. We got 250 or 300 stockholders into the partnership agreement. Maybe I am way off on it. It seems like it was put into a corporation about the middle of '35. I don't recall having anything to do with it. I don't recall having anything to do with obtaining any stock from the stockholders to exchange for stock of the Consolidated mines. I might have. I became a member and secretary of the Monolith stockholders protective committee. Mr. Shaw advanced me moneys from time to time so that I owed him an accumulation. In talking to the various stockholders in making this solicitation, I don't ever recollect mentioning Mr. Shaw's name. I don't know if Mr. Shaw had any stock in the Monolith himself, but I think his wife did. I am pretty certain she signed up. I recall her signature on the partnership agreement. Buroll and Nickles went to some town north and consummated a deal with some shareholders and very shortly after that Mr. Tyler and I called on that individual stock-

(Testimony of Milton G. Alexander.)

holder and his wife and found out that the stock had already been picked up for the mining stock and we immediately got in touch with the Los Angeles office and there was no more trouble after that.

Regarding the settlement of the lawsuit against the Monolith's officers; I know that we got a judgment for, my recollection is $1,280,000, or $1,820,000. (Stipulated to be $820,000). Well, Lybrand, Ross Bros. & Montgomery I believe it was made out checks to the various shareholders for a refund of a certain portion of the money that was paid into the committee for the propagation of that suit. That money went directly to the stockholders; I am pretty certain of that. I don't recall how much it was. The stock value was enhanced considerably. I believe the Monolith preferred at that time was down to about a dollar a share and eventually went to three or four almost immediately after the suit. The common stock quoted before the suit around six bits and went to a dollar and a half immediately. At the time I went out to gather stock for the mining deal, there was no open market whatsoever for it. The stockholders apparently were not satisfied to go ahead and remain stockholders in the Monolith Cement Company. Some of them, and others were—but they were very well disgruntled with the fact that Mr. Burnett was still at the head of the company. We tried to get him out through the suit and we

(Testimony of Milton G. Alexander.)

could not do that. So they were dissatisfied to see him still at the head of the company. I went around with Mr. Tyler to introduce him and have him explain his situation with respect to the proposition. He explained what the mining venture amounted to as far as the values of the assays and so forth, and what the plan was of getting into the mining venture and getting away from the Monolith. I believe the settlement was complete and the Monolith stockholders committee working at the time I started in on the new venture, but possibly the Midwest was not complete. I believe I collected most of the funds for the stockholders committee. It is possible I collected most of the stockholders' signatures to the Tyler partnership agreement. Tyler and I worked together. After seeing a list of names, I recollect rather distinctly of getting these signatures all alone without Tyler's assistance. I couldn't tell you whether Mr. Morgan got any or not. I know a lot of these names are very, very familiar to me. Mr. Tyler and I were on the road about three months. We went all over the state. I don't recollect once of crossing the border.

Redirect Examination

I don't know how much money was paid Mr. Shaw as an investigator. I did not sign the checks that he was paid, to my recollection. I don't recollect, if, as secretary of the committee, I signed checks. I don't recollect being on the bank account.

(Testimony of Milton G. Alexander.)

I don't believe, among my duties, was included paying checks *wither* alone or with anybody. I went back to Detroit in December 1935, and had no more connection then officially with the committee or with the gold mining enterprise. I do not know how much stock was traded or sold in '36 or '37 in this gold mining enterprise. I don't know anything about it. It seems like it was a commission I received for the stock Buroll and Nickles traded. I received some money for the deal. In my opinion Mr. Shaw owed me money toward the end. It is beyond my knowledge whether whatever stock was sold under this Tyler agreement, that money and stock went to Mr. Tyler. I know we sent it into the office. Mr. Tyler was with me at that time. The money and stock that we collected then at that time, we generally sent it to the Los Angeles office if we were out on the road for any period of time. Mr. Shaw and Mr. Morgan were in the office in Los Angeles at that time.

GARFIELD VOGET,

a witness for the Government, testified as follows:

Direct Examination

I live at Hubbard, Oregon. I am a creamery operator. I was living there back in 1932 and 1933. I was a stockholder in the Monolith Portland Cement Company. I had 100 shares of common and 600 shares of preferred Midwest. I deposited my Monolith Portland Cement stock with the Pacific National Bank of San Francisco, and received in exchange deposit certificates. The mining enterprise first came to my attention in the latter part of 1933 or the first part of 1934. I believe I got a letter from Mr. Morgan stating that he would advise to exchange the certificates for a mining deal that seemed to look very good to the committee and would, in his opinion, assure the members of the committee to receive back their money that they had invested in Midwest and Monolith about a hundred percent in time to come. Mr. Alexander called on me in 1934—about October 10, 1934. We had a conversation. No one else was present besides Mr. Alexander and I. I told Mr. Alexander that I did not have much faith in exchanging the stock, but he stated the case in such a manner and finally said, "I will tell you that before another year we will pay you at least $200 in dividends." And I told him then, "How in the world can you tell?" I said, "You can't tell what will happen in a year from now."

(Testimony of Garfield Voget.)

He said, "Well, what do you want to bet?"

I said, "I am not a betting man and I am not going to bet."

"Well, will you shake hands on it?"

I said, "Surely."

He was standing downstairs and he reached over the bannister and we shook hands, but I want you to understand I did not exchange my shares that day nor that year. I thought he was honest. I received a letter from Mr. Morgan several years ago asking for 50 cents a share to be paid to the Monolith Committee, but I withheld and did not pay any money until Mr. Alexander called, and then I had to pay them $350. I believe I sent a small check down to Mr. Morgan prior to this, and then $127.50 completed my payment, and that was at the same meeting where I didn't exchange the shares, but I paid my obligation to the committee. (Examining document) I didn't read it, so I will have to retract. I paid in $200 to the Tyler agreement.

(The document referred to was received in evidence and marked

"GOVERNMENT'S EXHIBIT No. 7.")

(Read by Mr. Norcop)

"October 10, 1934

"Received of Garfield Voget, none shares of Monolith preferred stock and $200 to be applied

(Testimony of Garfield Voget.)

on the Frank S. Tyler agreement in accordance with the terms and conditions, a signed copy of which is to be properly executed in my name, if, as and when the mutual agreement is finally accepted.

"Frank S. Tyler and Associates,
"By (Signed) M. G. Alexander."

The next was I received a letter from—(pause) (Examining document) June 12, 1935. I recall receiving that letter. I received a letter on the printed form of Monolith Stockholders Committee, 634 South Spring Street, Los Angeles, California, dated July 3, 1935, that came through the mails. I received another letter on the stationery of Consolidated Mines of California, the same address, giving a telephone number in Los Angeles, dated July 12, 1935, and I received another letter here. (Examining document). This is a letter which has at the top July 16, '35. That is a carbon copy of a letter I addressed to the addressee appearing at the top of the letter. I received another letter on the stationery of the Consolidated Mines of California, bearing date July 23, 1935. And another letter on the Consolidated Mines of California stationery bearing date August 24, 1936. I received a letter in handwriting on the stationery of the Hotel Hayward, which has in handwriting—that is Los Angeles—which has in handwriting, "March 8, '37,"

(Testimony of Garfield Voget.)

and another letter dated July 1, 1937, and still another one on the same stationery dated September 1, 1937.

When Mr. Alexander asked me for the $200, I told him, "What is the reason that you have for of more money?"

He said, "We have a man came from the East whose name is Mr. Tyler who has a very good mine and who has agreed to chip in with the stockholder committee and for his services and for completing the mine so that it could profitably be operated and agreed to take some of the Midwest and Monolith stock." I asked him what the stock was worth, and as far as I can remember he told me that the Portland Cement stock was only worth 75 cents and that the other was $1.25. I asked him how much money it would take and he said it would take between $15,000 to $20,000 at the very most because some machinery was already on the ground. And I asked him about the value of the mine and he told me according to the assays that they thought that the mine was at least worth, putting it low, $200,000. He stated that there would be no salaries paid to any of the officers until the mine would be in production.

(Letter of July 12, 1935 received in evidence as Government's Exhibit No. 8—subject to reserved Motion to Strike).

(Letter of July 3, 1935 marked for Identification as Exhibit No. 9).

(Testimony of Garfield Voget.)

(Letter of July 12, 1935 received as GOVERNMENT'S EXHIBIT No. 10 subject to reserved Motion to Strike).

(Read by Mr. Norcop)

"Consolidated Mines of California. 634 South Spring Street. Telephone Trinity 9606. Los Angeles, California. July 12, 1935. Mr. Garfield Voget, Hubbard, Oregon.

"Dear Mr. Voget:

"We have been looking forward to the time when we could send you such a gratifying report as we are now able to do, as a result of a day and night crew working on your property for 16 months.

"Although our engineer stated six months ago that we had developed sufficient ore of a value that would warrant the building of a mill, we thought it good business to continue our development work; and we are happy that we waited until now to complete the erection of our mill because the quality of ore being developed at the present time will materially change the type and size of the mill required.

"Development work on the McKisson Mine, has progressed along the following lines, and is compiled from our engineer's reports:

The Upper Tunnel has been driven 707 feet. Our Engineer reports that three main shoots of ore have been developed. One of these is 80

(Testimony of Garfield Voget.)

feet long; another 100 feet long and the third is approximately 130 feet long. In addition there are two other lenses 30 and 50 feet respectively. While these constitute the showing on the level it is believed that this entire area is in an ore zone.

"Samples in the stope on the 100 foot shoot indicate a value of approximately $23.00 (eliminating high assays) while the general dump samples gave $25.90 per ton. However, we recently shipped some 33 tons of this same ore to the smelter and it showed a gross of $37.26 per ton.

"The 80 foot shoot mentioned above has been stoped above the level with a reported yield in the mill of approximately $27.20 per ton. The 100 foot shoot shows value of $38.00.

"The Ditch Tunnel, 158 feet below the Upper Tunnel, has been driven easterly some 760 feet. A more or less continuous ore shoot—some 300 feet long has been developed on this level, the average value of which (eliminating the very high samples) is about $18.00 per ton.

"A raise was driven at station 476 from the Ditch Tunnel to the Upper Tunnel and samples showed an average value of $38.53. After the completion of the raise, work was resumed at station 621 in the Ditch Tunnel—The Menedue shoot being the objective. This tunnel has now been driven 760 feet. After passing station 621

(Testimony of Garfield Voget.)

a very fine ore body 125 feet long has been developed at this level with an average value of $31.83 per ton and we have not reached the limit of this shoot.

"The ore developed at 621 feet on, is an unoxidized ore, running very heavy in sulphides and shot through with considerable free gold. We believe we are entering the Menedue shoot, which is the main one, that we have been endeavoring to locate from the beginning of our development work. The last samples taken on this level assayed $63.00 and $74.00 per ton.

"Considering the fact that we could have shown a good profit on an average of $10.00 per ton ore, due to our low costs of milling, we consider this report very gratifying, owing to the much higher ore values than we ever expected.

"Our attorney, Honorable George J. Hatfield, has just completed our corporation in every detail and our Mr. Frank S. Tyler will have our certificates issued to each of us, very soon, as our partnership interest appears. There is only one class of stock, which has full voting rights and is non-assessable.

"The officers selected to head your enterprise are: Henry L. Wikoff, President; W. J. Morgan, Executive Vice-President; Frank S. Tyler, Secretary-Treasurer and L. D. Gilbert, Engineer and Superintendent of Mines.

(Testimony of Garfield Voget.)

"The small group of partners who started this enterprise own all the shares and at this time, it is not intended to do any public financing for we do not feel that this is necessary.

"Please feel assured that we will keep you advised as to developments, and we hope to have more great news for you as work progresses. In the meantime, we trust you will continue to give us your loyal support.

"Yours very truly,
"CONSOLIDATED MINES OF CALIFORNIA
"By: W. J. Morgan (signed)
"Executive Vice-President

"HLW:S."

—indicating "HLW" as the dictater and "S" as the receiver. This is a processed letter. It is either multigraphed or mimeographed. I don't know which, and the name is filled in at the top and the address. The signature, however, appears to be handwritten, I think that it is. It may be a very clever reproduction, but it looks like it is handwritten.

I meant to offer with this letter, if the Court please, the envelope.

(By the Witness)

I received the letter which is Exhibit 10 in the envelope that is attached to it.

(Testimony of Garfield Voget.)

(By Mr. Norcop)

The envelope is a Los Angeles cancellation date of June 13th. The letter is June 12th. The cancellation date in Los Angeles is June 13th, 3:30 P. M., 1935, and one of our California Pacific International Exposition stamps is on there, so that was about the time we were advertising the Exposition.

(By the Witness)

I believe I got a letter from Mr. Tyler to exchange my Midwest stock for Consolidated. Either that or he called me up. I know Mr. Tyler called me up over long distance, and wanted me to exchange, and said that this was about my last opportunity to exchange my Midwest Portland Cement stock for Consolidated Mines. I told Mr. Tyler either that same evening or the next morning that I did not like to be rushed. I answered him by letter. That is my letter.

(Testimony of Garfield Voget.)

(Received in evidence as
GOVERNMENT'S EXHIBIT No. 11
Subject to reserved Motion to Strike).

(Read by Mr. Norcop)

Hubbard, Ore July 16-35

"Mr. Frank S. Tyler,
"Los Angeles, Calif.

"Dear Sir:

"Your phone call was quite a surprise. It is certainly asked too much for one to make up his mind in such a second of time. My wife is partners in the shares of Monolith Midwest and she will not give her consent unless we have something more definite.

"Where is the mine located, what is the cost per ton of mining, will water interfere in the shafts, will expensive pumping to be done, how many shares are issued and for how many shares is the Co. incorporated for, how far is it to R Road or Smelter, what is the expense shipping it there? And many other questions, such as you would want to know, when you make a deal of this kind.

"Mr. Morgan states in his letter that we have a good chance to recover the full amount of the shares with 7% interest, it seems to me that a decision should be rendered in the near future, as it has been filed with the Court.

(Testimony of Garfield Voget.)

"Wife and I want to have some assurance that we do not get a worthless proposition and are out of our Midwest entirely. I have paid my part to the Stockholders Committee and your new proposition certainly raises the doubt with us, if it must be done in a hurry, or we be out. Do you think that is fair. Why did you not write another letter about the mine, with the one you sent, this is the first that I knew about you having a mine, unless that Mr. Alexander mentioned it when he was here a year ago.

"Now in all fairness to us, please give us a clear outline, description and location of mine, if it is on a lease royalty basis, or if and how much ground that we owe."

(By the Witness)

I signed the letter and sent the original of that through the mails to Mr. Tyler.

(Testimony of Garfield Voget.)

(Letter dated July 23, 1935 received in evidence as

GOVERNMENT'S EXHIBIT No. 12

subject to Motion to Strike).

(Read by Mr. Norcop)

"July 23, 1935.

"Mr. Garfield Voget,
"Hubbard, Oregon.

"Dear Mr. Voget:

"In reply to your letter of July 16"—and that is the letter (exhibiting)—"I am pleased to give you the following information.

"The mine is located 21 miles east of Jackson, Calaveras County, California. We have an unlimited supply of water running directly in front of the entrance to the tunnel, making our pumping costs practically negligible. The only water encountered in the tunnel is normal seepage, which drains out.

"The Consolidated Mines of California was incorporated for 1,000,000 shares of No Par Value stock. At the present time 150,000 shares have been authorized for issuance with no Treasury Stock for sale.

"The mill will be located directly below the water supply and as the paved State road runs within one mile of the millsite, trucking of the concentrates may be done with the utmost fa-

(Testimony of Garfield Voget.)

cility. Contracts are now being let for the building of the mill, and it is contemplated that we should be in production about September 15.

"For the past 16 months we have been running a day and night shift, developing ore. Our engineers report that we now have enough ore blocked out to justify the erection of the mill with assurance that we have sufficient ore for continuous operation.

"Our assays show that the value of the ore we have developed is much higher than we had anticipated. An average taken of several hundred assays runs in the neighborhood of $35.00.

"A carload of ore sent to the smelter at Selby gave us a return of $37.26 per ton, as the enclosed photostatic copy of the smelter report shows.

"I delayed answering your letter until I could check with Mr. Alexander regarding the original transaction with you. He advises me that through him you turned in one hundred (100) shares of Monolith Portland Cement Company Common stock and I am now preparing to issue to you one hundred forty (140) shares of Consolidated Mines stock as a result of this transaction.

"In offering to accept your 600 shares of Midwest stock in exchange for 600 shares of

(Testimony of Garfield Voget.)

Consolidated Mines, I am making to you the identical proposition which I have made to the original partners in this enterprise. At the present time I must restrict this offer to my original partners, only, for the reason that there is a market for only a limited number of shares of the Monolith Portland Midwest stock and my only reason for asking an early decision is that I was fortunate enough to find a place for the Midwest owned by the people who went in with me originally; but I do not know, at this time, that I could handly any from anyone else.

"I appreciate the fact that you have paid your part to the Stockholders Committee for the Midwest litigation. The complaint on the Midwest suit has been filed and I have no reason to believe that ultimate recovery could not be made. However, as in all matters of this type, the element of time is all important and unquestionably it will take quite a while for this matter to be finally determined. In the meantime my reports from the mine have been sufficiently encouraging to me to say to you that I feel that the transfer would be an advantageous one from the standpoint of your wife and yourself and I am so advising you. I base this on the fact that conditions at the properties of the Consolidated Mines have progressed far more favorably than we originally anticipated,

(Testimony of Garfield Voget.)

and it seems to me that you have a greater assurance of return on your investment, and it is my personal opinion that there is not as much risk involved.

"Both Mr. Morgan and I wish you to feel that there has been no negligence on the part of the committee in the prosecution of the suit; but as stated above, in all fairness, I must say that from my standpoint, I feel that the Consolidated is a much better place for funds at this time.

"Because of the limitation of my market on Midwest, I must request an early decision as the market on Midwest may go considerably *lowe*. I therefore ask that, should you decide to accept this proposition, you immediately wire me at my expense, at 634 South Spring Street, Los Angeles, confirming the fact that you will send your Midwest to me, and I in turn will hold for your account 600 shares of Consolidated Mines. I will then ask that you endorse the certificate in blank, by yourself and your wife, if it is made out in both names, have your signature guaranteed by the bank, and then send the *cretificate* to me by Air Mail, Special Delivery.

"Unfortunately we are compelled to handle this transaction at a long distance; but I want you to know, on behalf of Mr. Morgan and Myself, that it is our sincere desire to protect

(Testimony of Garfield Voget.)

your interest just the same as if you were able to come to our office every day. We will leave nothing undone to attempt to make the Consolidated Mines of California a success, which we feel that it can be.

"Awaiting your immediate reply, I am,

"Very sincerely,

"Frank S. Tyler (signed)

"FST:S."

Then contained with the letter is a photostatic copy of a smelting report by the American Smelting & Refining Company, Selby Smelting Works, 405 Montgomery Street, San Francisco, California.

This report shows "Received of The McKission Mine, Mokelumne Hill, California," giving the lot number and the date of its arrival, being December 28, 1934, showing the check having been issued by the smelter to F. S. Tyler, 634 South Spring Street, Los Angeles, California, and showing that the sacks in bulk weighed 66,340 pounds, moisture 3.1 percent, making a total of 2,057 pounds, showing dry weight, subtracting the moisture from the gross, showing net dry weight of 64,283.

Then it goes on to show the percentages and prices and the credits, and it says "Value of 64,283 pounds"—that is the total net—"at 30.53 per ton, $981.28."

(Testimony of Garfield Voget.)

Then there is a deduction for the bank's bill for supervision and unloading truck showing the net proceeds to be $958.71.

I have omitted a few figures there, Judge Montgomery. I don't believe they are necessary.

The envelope shows two 3-cent stamps, a special delivery. It went airmail special delivery, and that was cancelled in Los Angeles on July 23rd, the same date as the letter.

(Letter dated August 24, 1936 received in evidence as

GOVERNMENT'S EXHIBIT No. 13

subject to Motion to Strike)

(Read by Mr. Norcop)

"Aug. 24th, 1936.

"Dear Mr. Voget:

"Please pardon the delay in answering your letter dated Aug. 14th. My correspondence has been so voluminous that I am just beginning to see daylight.

"The mining company was organized by a number of the stockholders who are members of the committee. All participated as individual investors. My identification on the Board of Directors and in the capacity of Executive Vice President, I feel has been beneficial to the

(Testimony of Garfield Voget.)

stockholders that became interested. We have never sold or offered any of the Treasury stock, the entire 550,000 shares are still in the Treasury.

"There has been some delays in operation, and obstacles to overcome, that are usually prevalent in any new undertaking of this nature, but we hope and believe they are behind us. Last month the returns were about $1500.00 above the operating expenses, and if we can maintain that schedule, or better, as our Engineers feel that we can; the investment should be profitable to the shareholders.

"Larger capacity air machinery was installed last month, and several other changes effected.

"When anything develops that will be of interest, I will be glad to communicate it to you.

"Very truly yours,

"W. J. Morgan (signed)

"Executive Vice President

"WJM-r."

(Testimony of Garfield Voget.)

(Letter dated March 8, 1937 was marked GOVERNMENT'S EXHIBIT No. 14 for identification only).

(Letter dated July 1, 1937 received as Government's Exhibit No. 15—subject to Motion to Strike).

(Letter dated September 1, 1937 received as Government's Exhibit No. 16).

(By the Witness)

Mr. Tyler visited me in March of 1936—I believe it was the 24th day of March. He came alone. He and I had a conversation about this mining enterprise. No one else was there besides he and I. It was in my place of business. Mr. Tyler spoke very highly of the mine and my answer was that I was very much surprised seeing him and him asking me to make an exchange for my Monolith stock because it was nine months ago when he called me up over long distance, and I suppose I had to pay that, I told him. Then my letter followed, and his answer, and then after nine months he was still after me to exchange my stock. He left and returned in a few days. In that conversation I mentioned a quotation in my native language to him. "Das papier ist geduldig." That is German. Its translation in English is: "That paper has lots of patience." Mr. Tyler returned on the 28th of March. He had another man with him—Mr. Wahlberg. We three had

(Testimony of Garfield Voget.)

a conversation downstairs, and then after a few minutes Mr. Wahlberg asked me to come upstairs. He and I went upstairs to my private office. He said on the invitation or request of Mr. Tyler, in order to close this deal, he had come back airplane to interview me, that he was a financial adviser or commentator, and that he would never recommend making this exchange unless he knew from his own point of view that it was a sound deal. I had the 600 shares of the Midwest, Monolith Midwest that these gentlemen suggested I exchange for the gold enterprise. I signed an agreement or at least turned over my stock. They gave me an order on the stock.

(Carbon copy dated March 24, 1936 received as Government's Exhibit No. 17—subject to Motion to Strike).

I have seen a letter dated March 30, 1937, on the stationery of the Consolidated Mines of California. That letter came to me by mail. This is the envelope in which the letter was contained.

(Letter and Envelope received in evidence as

GOVERNMENT'S EXHIBIT No. 18

over objection).

(Read by Mr. Norcop)

"Dear Mr. Voget:

"The delay in answering your letter is due to the fact that the Company is getting out an

(Testimony of Garfield Voget.)

annual report which will give you full information. This should be available in the near future; but in the meantime we want to assure you that the progress made to date is very satisfactory,

"Very truly yours,
"CONSOLIDATED MINES OF CALIFORNIA
"By Frank S. Tyler, (Signed)
"FRANK S. TYLER,
Secretary."

And the whole letter seems to be, except for the addressee, a processed or multigraphed letter or mimeographed letter. So it doesn't mean that it was written to him personally, but just his name filled in at the top, and the envelope has the name of the company and the address, and, as I said before, the cancellation of March 31st is addressed to Mr. Garfield—oh, it is addressed to just Mr. Garfield, Hubbard, Oregon.

(By the Witness)

Mr. Alexander mentioned that Mr. Morgan gave the stock in order to get the new promotion started, or that he subscribed the stock. Mr. Alexander did not exhibit to me the Tyler partnership agreement. I can't remember Mr. Shaw's name was ever mentioned.

(Testimony of Garfield Voget.)

Cross Examination

Mr. Tyler gave me—(Pause)—it says right here (indicating document).

(Certificates of stock 691 and 697 received in evidence as Defendant's Exhibits A and B).

Since I obtained this stock, it laid around, resting in a box. I didn't try to exchange it for oil stock or anything. I tried to exchange my Midwest stock for oil stock. I did not succeed. I can't remember how much I considered my Midwest stock to be worth, nor what I offered it for. If I ever obtained any other offer than this one, I don't remember. I never gave an order to anyone down here to turn it over for oil stock or otherwise. I never received a dividend on it.

Redirect Examination

I don't remember the year I was attempting to sell my Midwest for oil stock, but it was in the early beginning of the trial, before the outcome was known.

CHARLES WOHLBERG

a witness for the Government, testified as follows:

I have been in Utah working practically all of last year, though I still call Los Angeles, 1034 South Corcoran, my home. I have known W. J. Shaw something over 20 years. I first met Mr. Shaw in the central-west, about 1914. We were business partners in the financing of the Western Auto Supply Company about 1922 or 1923. I was associated with Mr. Shaw in that enterprise about a year. I had business dealings with him about 1935. I was engaged to collect money from stockholders of the Monolith Midwest Company to prosecute a similar lawsuit to the one that they had previously had against the Monolith Cement Company. Mr. Shaw employed me to perform that work. That was here in Los Angeles. I employed another salesman and my work in that respect was partially solicitation, to a small degree, on my own account, but largely supervising his work, for which I received a small overriding commission. We solicited funds from the Midwest stockholders to prosecute a suit against the principals of that company. There was a list of these shareholders given to me to call upon. Mr. Shaw or someone else gave me that list. At that particular time when we were soliciting funds for the committee, personally or through me we called on several hundred shareholders of the Midwest or Monolith Portland Cement. I worked for the Monolith Committee soliciting these funds about 10 to 12

(Testimony of Charles Wohlberg.)

weeks as I recall in the year of 1935. I had some contact or relation with the mining enterprise known as the Tyler agreement or the Consolidated Mines sometime in 1936. I may have heard of it a number of times even during the period that I was collecting funds for the committee, but I had no active interest in it during that period. The first active interest I had in it was some time during 1936. I did some work for the mining enterprise after the company was formed in 1936. I recall Mr. Henry Wikoff and Mr. W. J. Morgan and Mr. Tyler as directors of the mining company. I believe Mr. Morgan and Mr. Wikoff were associated with the Monolith Committee. Before I went to work for the mining company I think I discussed it generally with Mr. Morgan at length, Mr. Shaw at length, Mr. Tyler at length, and to a lesser degree perhaps with Mr. Wikoff and another gentleman—I think it was Marcovitz. I was employed to work by the committee, and I also received compensation and did work through Frank Tyler. I never worked for the mining company itself directly. At the time I was connected with the gold mining enterprise, I was actually working for the Monolith Committee. The mining company having been formed and the stock having been issued to Mr. Tyler, the members of the committee became the principal officers of the mining company. It was agreed that the committee members should be approached and the sug-

(Testimony of Charles Wohlberg.)

gestion made that they transfer their interest from the certificates of the Midwest Company to Mr. Tyler who, in turn, was to complete certain phases of the mining venture. Practically all the time when I was in the field, for the mining company, I was with Mr. Tyler. When I personally called on committee members, I brought up to date the activities of the committee, told them what the committee members felt as to the future of the Midwest Company.

I called largely on shareholders of the Midwest and told them that the heads of the committee had transferred their holdings from the Midwest or Monolith, as the case might be, to Mr. Tyler, and that naturally having done so, personally they felt that it was a good thing for others to do.

I then introduced Mr. Tyler who, in turn, gave them his opinion of the mining project. We had a list, a copy of an original partnership list with various signatures which we, in many cases, showed. That was the agreement known as the Tyler agreement. The only names on that list that would stand out in my memory at all would be the names of Mr. Morgan, Mr. Alexander, and Mrs. Edna Shaw. A copy of the agreement was not left with the shareholders. In most cases, when I called on them, I showed them a copy of the agreement with those names on it. The transfers in the main were made through Mr. Tyler. An agreement was signed whereby they agreed to transfer to Mr. Tyler their cer-

(Testimony of Charles Wohlberg.)

tificates and he, in turn, accepted that. I don't recall the exact detail, but I believe it stated that he in turn would deliver so many shares of stock, of his personally owned stock of the Consolidated Mines. At these transfers there was no money exchanged for stock through me, as I recall it. I worked in California and I made one trip to Oregon where I effected in this matter some exchanges. In Oregon I called on Mr. Voget who testified here yesterday among others. I went there alone by plane and I met Mr. Tyler there. Before I went to Oregon, conversations were had in Los Angeles with Mr. Morgan and Mr. Shaw in regard to the Oregon trip. That was in 1936. I made considerable inquiry prior to the time that I did any work, both as to these securities being exempted under the Corporate Securities Act and the Securities and Exchange Act. Mr. Shaw and I spent considerable time discussing that. Mr. Shaw and Mr. Morgan felt, as a result of conferences they had had with their attorneys, that these securities were exempted under both the Corporate Securities Act and the Securities and Exchange Act inasmuch as it was Mr. Tyler's personally owned stock. I personally felt at the time that there was no violation. When I speak of "securities" I mean the stock which Mr. Tyler owned in Consolidated Mines. I was paid by the committee and I also received some compensation from Mr. Tyler. Mr. Tyler had possession of the stocks. Mr. Tyler was with me practically all the time when I was making these exchanges.

(Testimony of Charles Wohlberg.)

Cross Examination

I have been in the securities business over 20 years. I was engaged in financing a great many companies and then went into the brokerage business here. I wrote for the Evening Herald here and various smaller magazines on some financial matters; the company had been formed, when I went out to make the exchanges. I saw a permit from the Corporation Department to issue the stock to Mr. Tyler. I don't know whether the actual issuance was completed or not. The authority to issue had been given. My understanding of the set-up is, that at the time that the permit was granted by the Securities Department of this state that Mr. Tyler received a certain number of shares of the Consolidated Mines for and in consideration of his turning over certain interests in mining properties, that he was given that as his stock in exchange for certain mining properties and, therefore, he became the owner of them. Whether or not it was actually issued on the books or not, that I can't say, but I saw an authorization to issue. It was stipulated that there was a permit from the Commissioner of Corporations to sell the stock. Within the state of California is the only place where sales were consummated. My conversation with Voget was substantially the same as others. I gave them the history of the Monolith suit and then the status of the Midwest suit up to that point. My best recollection is that we showed a balance sheet of the Mid-

(Testimony of Charles Wohlberg.)

west Company which at that time was not particularly inviting from a financial standpoint, and we stated that while the recovery had been made from the Monolith Company, that it was thought unlikely that even though a suit could be successfully prosecuted that it could be collected and that as a result the head of the committee felt they had a better opportunity to recoup their loss in entering into a mining venture than continuing their holdings in the Midwest Company. I was what you term mining-minded at the time. I believed that the mine had a chance of success. I thought it was a good speculation. I don't recall if I had the engineer's reports with me. I discussed the mine with a Mr. Sampson at some length prior to the time. I don't believe I, personally, had any maps. As a matter of fact, Mr. Tyler did most of the discussing of the details of the mine itself. I think he had engineers' reports with him. One or the other of us had a copy of the Tyler partnership agreement at the time. We simply were showing to the people those who had effected exchanges of their stock. We didn't call on people who were in the partnership. The partnership showed the names of those people who had agreed to exchange their interest in the cement company for the stock of the mining company. I gave the names of those that I recollect. (Examining document) This name seems to come to my memory, the name of Bullard. I will have to plead lack of remembrance. I did not take up the exemption of those securities with any S. E. C. man.

(Testimony of Charles Wohlberg.)

I discussed it with Mr. Shaw and Mr. Morgan. I think Mr. Morgan felt that they were exempted.

About these particular certificates taken up into Oregon, the Vogets. The discussion came up just about in that way. I think prior to the time it was contemplated that I would make the trip to Voget, whether or not the securities were exempted, and I think it was concluded, at least it was the opinion of the people at that time, that if Tyler personally effected exchanges, that they were exempted. As I recall it, the Securities Act at that time had no bearing at all on the sale of securities within the state. It was only affected by interstate commerce. I don't know that I had any discussion with Mr. Morgan; I merely saw his signature attached to a document which stated he had transferred, and so I assumed that he had done so. I had the opinion that anything he signed was correct. I do not recall the first name on the Tyler agreement. It could well be H. S. Wikoff. His name was on it. I met Mr. Wikoff for the first time there at the office. I understood he was a retired banker, I believe, from the Central West, and that he had been a member of the stockholders committee. Mr. Morgan was present in the office of the company whenever I was there. He spent his full time there. I discussed these matters with him on a number of occasions. I understood Mr. Shaw's title was investigator for the committee. He was not a member of the committee to my knowledge. What he was actually doing, I can't answer you. Mr. Morgan knew about this mining proposition. I discussed it with him. I told these

(Testimony of Charles Wohlberg.)

various parties that I solicited what the members of the committee thought about the mining proposition. Mr. Morgan was enthused about the mine at the time, about its prospects, and that it had possibilities of becoming something. I did not find any doubt at all in any of these gentlemen connected with the committee or the mining company but what they were going to have a successful venture. I do not know of my own knowledge anything about the work that had been done on the mine at the time that I saw Mr. Voget. It was hearsay. I was not up there myself. Mr. Tyler was present when I called on Mr. Voget and Mr. Tyler made the statement to Mr. Voget as to what was being done. My statements were rather in generalities—that I thought it was a good mining company. I actually believed what I was saying. Mr. Voget had certificates of the Midwest Company that I solicited the exchange of. I don't recall any specific discussion as to the value of that stock. I don't personally have a copy of the agreement to transfer the stock to Tyler. Exhibit 17 is the one I referred to. As I recall, he had Midwest stock. It is very possible that he may have had common stock of the Monolith. We effected some exchanges of common or preferred stock of the Monolith Company, but those were isolated cases. Our main exchanges were of the preferred stock of the Midwest Company.

(Two certificates produced by Mr. Norcop, one for 600 shares of mining stock, one for 140 shares).

(Testimony of Charles Wohlberg.)

(By the witness)

My recollection would be that the 600 shares represented the preferred stock of the Midwest Company, and perhaps the 100 shares represented the common stock of the Monolith Company. I don't know whether Mr. Tyler signed this Exhibit 17 at that time. It looks like his signature. I am under the impression that all of those agreements with Mr. Voget read the same. It was my understanding that that was not within the Corporate Securities Act at that time. I have no recollection whether Mr. Tyler issued the certificates right there.

MARIE M. D. CRAIG

a witness for the Government, testified as follows:

Direct Examination

I live at Riverdale, Fresno County. My husband's name is W. L. Craig. Mr. Craig and I owned some shares in the Monolith Cement Company. I think 68 preferred and 34 common; and in the Midwest, 282. Of this committee that collected the Monolith and Midwest shares, all I know is Mr. Morgan. They took our shares to San Francisco, and put them in the bank at San Francisco. I don't recollect if that was both our Midwest and our Monolith shares. I believe it was Mr. Alexander who called upon us to get us to give 50 cents a share for promoting the committee's campaign. I don't think Mr. Craig and

(Testimony of Marie M. D. Craig.)

I put up this 50 cents a share with the Committee at the time.

I heard about the gold mining enterprise known as the Tyler agreement, or the Consolidated Mines of California first in the latter part of '35. Mr. Alexander called at my home at that time. No one was with Mr. Alexander at that time. Mr. Craig was at home at the time he called. We had a conversation with Mr. Alexander at that time, at my home on the ranch, 10 miles from Riverdale, Fresno County, in California. Mr. Alexander said he had been up to the mine and he thought it was a good proposition. He had a piece of ore. Of course, it didin't look very much like there was very much gold, but there were indications of it. And he said that he thought he would buy some shares too, he talked it over with his wife and his wife thought they would take a chance on it. They said they weren't taking much of the ore out at that time, they had a small mill, and what they were making off it they were putting back to get a larger mill so they could get more ore out, and that they expected—not at that time—but they expected it would be quite a paying proposition. As to who was being paid in this promotion, I believe he said only the engineer and they were putting what they were making right back into the mine again. I believe he said that the ore was worth about $27 a ton, but there was the other ore, some ore was worth more than that. There was nothing said in regard to

(Testimony of Marie M. D. Craig.)

dividends at that time. The following year, early in 1935, Mr. Tyler and Mr. Alexander came to our ranch. My husband was present during that conversation, and no one else. They said that it looked promising and that they thought that they would take quite a bit of ore out and that they thought at the end of a year, around December, that they would be able to pay us dividends. Later on a letter came, and Mr. Morgan's name was signed to it. In their discussion they said that Mr. Morgan had turned all his Monolith stock in for the mining stock. I met Mr. Morgan. I had business dealings with him through the Monolith Committee. I went to see him once in San Francisco. I exchanged all my shares of Monolith and Midwest for the gold mining shares. I think it was 806 gold mining shares I got in exchange. I believe they wanted to sell the stock so that they could get money enough to work the mine. (Examining documents) This certificate of the Consolidated Mines of California for 524 shares. It is No. 528—is one of the certificates that I received. And the second is No. 423 for 282 shares.

(By Mr. Law)

The signature is Frank S. Tyler, secretary, and W. J. Morgan, executive vice-president, and it is dated the 1st day of February 1936. Now, that is No. 423. And the same name on 528 and dated the 15th day of February 1936.

(Testimony of Marie M. D. Craig.)

(By the witness)

(Examining Document)

I received a letter on the letterhead of the Consolidated Mines, dated July 26, 1935, addressed to Marie M. B. Craig, and signed by Frank S. Tyler. That came to me through the mails.

(The document referred to was received in evidence and marked

"GOVERNMENT'S EXHIBIT No. 19.")

Subject to a Motion to Strike.

(By Mr. Law)

This is Consolidated Mines of California, July 26, 1935. It is a Los Angeles address here.

"Marie M. D. Craig,
"R. F. D. #1,
"Riverdale, California.

"Dear Mrs. Craig:

"I am now preparing to issue to my original partners in the Consolidated Mines, the stock which is due them.

"As a result of the 68 shares of Monolith Preferred and 34 shares of Monolith Common, you are entitled to and will receive 449 shares of Consolidated Mines of California stock. As explained to you in my letter of a short time ago, there has been no Treasury Stock offered

(Testimony of Marie M. D. Craig.)

for sale, nor do we propose issuing any Treasury stock at this time.

"In addition to the 449 shares you will receive; I am offering to exchange 282 shares of Consolidated Mines of California for your 282 shares of Midwest.

"Thus far I have confined this offer only to my original partners and each one is being permitted to transfer the stock on the same basis—that is, share for share.

"Should you decide to accept this offer, it will be necessary for you to wire me at my expense, immediately upon receipt of this letter, advising me of your acceptance. You will then endorse the certificate in blank, as the name appears on the face of it; have the bank guarantee your signature, and then send it to me at once, at 634 South Spring Street, Los Angeles.

"In addition to the above, I will permit you to buy an additional 269 shares for the sum of $538.00, which you can pay either in one check or $238.00 down and the balance over a period of three (3) months. Should you avail yourself of these two allotments, you would then own a total of 1,000 shares of Consolidated Mines.

"I wish to say to you, Mrs. Craig, that practically all of my partners in this transaction have been very glad to accept the offer which I have made to them for the reason that the situation at the property is most encouraging.

(Testimony of Marie M. D. Craig.)

Our engineers advise us that we have a substantial amount of ore blocked out and in sight; and the assays are running much higher than we originally anticipated. They also advise us to start work on our mill at once, which we are doing, and which we expect to have completed on or about September 15; and after that date we should start getting returns.

"As pointed out in my original letter, we have been working continuously on this matter, for many months and we are all very much enthused about the results accomplished to date, and feel that we have reason to look forward to a successful enterprise.

"I regret that the distance between us makes it impossible to give you this information in person; but I wish to assure you that the other officers of this company, as well as myself, expect to give their best efforts to make this company an outstanding success.

"I shall look forward to your telegram, immediately upon receipt of this letter.

"Trusting this is the information you desire and hoping that you will take advantage of the opportunity, I remain,

"Very truly yours,

FRANK S. TYLER (Signed)"

(By the Witness)

I did not put any cash into this deal. This receipt made out to me and signed by M. G. Alex-

(Testimony of Marie M. D. Craig.)

ander for 68 shares of Monolith preferred stock and $68 to be applied on the Frank S. Tyler agreement in accordance with the terms, and so forth is just for shares.

(The document referred to was received in evidence and marked

"GOVERNMENT'S EXHIBIT No. 20.")

(Examining document)

I got this in the usual course of the mails.

(The document referred to was received in evidence and marked

"GOVERNMENT'S EXHIBIT No. 21.")

(After objection overruled)

(By Mr. Law)

This is on the letterhead of Consolidated Mines of California, Bay Cities Building, Santa Monica, California. Dated July 1, 1937.

"Mrs. Marie M. D. Craig
"R. F. D. #1
"Riverdale, California.

"Dear Mrs. Craig:

"Due to a difference of policy governing the underground procedure, a change in the personnel at the mine has been put into effect.

"Mr. Colman O'Shea, who has had a wide

(Testimony of Marie M. D. Craig.)

experience in the operation of quartz mines, has been put in charge of operations at the mine.

"Mr. Byron E. Rowe, who has successfully operated mines in this section for over thirty years, has been made 'Assistant to the President' and put in full charge of directing policy and methods of mining and development.

"These men became active May 1, 1937 and the results obtained under them the first month are very encouraging—showing a profit for the first month; and after a careful and thorough study of the development to date, in their judgment, we may expect a continuance of satisfactory results.

"Not one of your officers is on the payroll and they will not be, until the corporation is paying satisfactory dividends; and they are just as anxious as you are, to receive them.

"We have moved to our new location in the Bay Cities Building, Santa Monica, California —not only because most of our business is transacted at our office at the mine in Mokelumne Hill, California; but because it is more practical and less expensive.

"In the future you will be kept fully informed as to important developments and decisions.

"On behalf of the Board,
"Frank S. Tyler (Signed)
"FRANK S. TYLER,
Secretary."

(Testimony of Marie M. D. Craig.)

That came in this envelope dated Santa Monica, California, July 3, 5:00 p. m., 1937.

(By the Witness)

(Examining Letter)

I received this letter through the mails. (Mr. Law announced that the letter is dated October 10, 1935, and approved by Frank S. Tyler but not signed).

(By the Witness)

(Examining Letters)

I received this letter dated September 1, 1937, addressed to Marie M. D. Craig, and signed by H. L. Wikoff, through the mail; and this letter dated May 13, 1936, addressed "Dear Stockholder" and signed by Frank S. Tyler, secretary and treasurer; and this letter dated October 21, 1935, addressed to Mrs. Marie Craig and signed by Frank S. Tyler; and this letter dated November 19, 1935, addressed to Marie M. D. Craig, and signed by Frank S. Tyler; and this letter dated November 18, 1935, addressed to Mrs. Marie M. Craig and signed by Frank S. Tyler; and this letter dated November 8, 1935, addressed to Marie M. Craig and signed by Frank S. Tyler; and this letter dated August 9, 1935, addressed to Marie M. Craig and signed by Frank S. Tyler; and this letter dated July 12, 1935, addressed to Marie M. D. Craig, and signed by W. J. Morgan, executive vice president.

(Testimony of Marie M. D. Craig.)

Cross Examination

I don't remember whether I was one of the original partners in the Tyler agreement. (Examining receipt) I didn't know that it was the agreement. This is the shares that I turned in. They gave me a receipt for it. I guess that was turned in on the partnership agreement. I guess it was the agreement then. I don't recall anything about putting in the $68 together with the 68 shares of stock. I did have 68 shares of Monolith preferred stock. I produced this receipt. This is the one I had, that has got my name signed there. That is my name and that is my husband's. They told me just to sign M. M. D. C. and at the bottom is my husband's initials.

(By the Witness)

I never got any dividends on the Midwest stock. I had owned it quite a while. Several years, anyway.

GEORGE J. PORTEOUS

a witness for the Government, testified as follows:

Direct Examination

I am a mill man, assayer, and a miner. I was residing at Forest Creek Mine, in the Westpoint mining district, about 22 miles from Jackson. There are three forks of this Mokelumne River. It is the middle fork that I am living on. I owned or had control of some mining claims in that district about

(Testimony of George J. Porteous.)

that time. Some of them I had optioned to Mr. McKiver. Those were the Grand Prize and Mineral Lode. They were located on the Licken Fork River —as the crow flies about a mile and a half from the Forest Creek Mine where I now live. Mr. McKiver turned those over or sold them to Mr. Tyler. Following that, I entered into an agreement for some claims with Mr. Tyler.

This is a copy of the agreement that I entered into with Mr. Tyler. It bears the date of the 12th of December 1933 and states it is between George J. Porteous and Frank S. Tyler. It is not a signed copy. It is a carbon copy.

(The document referred to was received in evidence and marked "Government's Exhibit No. 22.")

Mr. Norcop: I am not going to read this, but just point out that the agreement is between George J. Porteous and Frank S. Tyler. It is of the date of December 12, 1933, and calls for a purchase price of $14,000 and provides that that price may be paid by paying a 15 percent gross royalty of all minerals extracted from the property as is shown by the smelter returns, and it covers the Grand Prize mining claim, the Grand Prize extension mining claim, formerly known as the Gold Bar Mine. That covers 40 acres. And also the Mineral Lode, without saying how many acres.

(Testimony of George J. Porteous.)

(By the Witness)

$14,000 was the full purchase price paid to me in accordance with the terms of that contract. I didn't receive any on that contract. I didn't receive any money at all, except what work they did on the property. They cleaned out a 200-foot tunnel on the Mineral Lode. Three fellows that I had put in there did the work, and I was there. That work was paid from the time that McKiver had the property. McKiver went on working for the people that had this contract with me. I did not have any discussions with Mr. Shaw about that agreement. I received only what work was done, by day's pay. In '36 I made another agreement concerning this same mine. I made a trip to San Mateo some time after I signed this first contract. Mr. Shaw telephoned up to Gilbert to come up and see me if I wanted to make a deal on the mine. I said I was willing to, so he came up and got me and took me on down to San Mateo. Mr. Shaw was at San Mateo shortly after we got there. The work was done before I went down. No cash payments were made on the first contract. That would be in '36 that I was in San Mateo. No one else was there with we three gentlemen while we were talking. All that transpired was making out the bond and signing the bond and making the agreement for the Grand Prize and the Mineral Lode, the same property that I had in this first contract. The new agreement and new bonds and lease was because the other one had run out. I en-

(Testimony of George J. Porteous.)

tered into a written agreement with Mr. Shaw there at San Mateo in '36. (Examining document) This is the contract that I have just referred to as being negotiated in San Mateo. The signature up here at the top is mine. And Consolidated Mines of California by blank, president, by blank, secretary, with no signatures. I signed the original.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 23.")

GOVERNMENT EXHIBIT No. 23

(Agreement dated the 15th day of October, 1936, by and between George J. Porteous, a single man, of the County of Calaveras, State of California, party of the first part, and Consolidated Mines of California, a corporation of the State of California, of Los Angeles, California, party of the second part:)

* * * * *

(Omitting pages 1 and 2 of the carbon copy of this Agreement and commencing with the last line of page 3, the Exhibit reads as follows:)

"In Witness Whereof, the said parties have hereunto set their hands in duplicate the day

(Testimony of George J. Porteous.)

and year in this agreement first above written." (In handwriting): "It is further agreed that party of second part shall pay to party of first part, the sum of $50.00 per month each and every month for five months from date of this agreement and $100.00 each and every month thereafter as long as this agreement is in force. If any payment is not made by the 15th of each month this agreement becomes null and void." (In typing): "..... Party of the First Part. Consolidated Mines of California, By (Signed) (Handwriting): W. J. Shaw Agent. By ..... Secretary," Party of the Second Part (And following the "Party of the Second Part", handwriting as follows): "It is also agreed that the full purchase price of $12000 must be paid within three years from date and it is further agreed that the full purchase price is to be $7000.00 if paid on or before Mch 15-1938. W. J. Shaw, Agent."

Mr. Norcop: This agreement is dated the 15th of October, 1936, between George J. Porteous of the County of Calaveras, party of the first part, and Consolidated Mines of California, a California corporation, Los Angeles, party of the second part.

Apparently it covers the same properties that were covered in the yellow carbon copies of the

(Testimony of George J. Porteous.)

earlier date, that is, the Grand Prize, formerly called the Gold Bar, and also the Mineral Lode.

Mr. Norcop: The price as set out here is $12,000 and any previous consideration hereto paid by the party of the second part—that would be the mining company—and received by the party of the first part.

On page 3 of the document, the fourth paragraph apparently was X'd out and initialed by both parties, as the initials "O. K., G. J. P." and then the word "out" is written.

At the concluding part of the agreement there is written in handwriting, "O. K.," then "G. J. P." and in handwriting is the following, "It is further agreed that party of the second part shall pay the party of the first part the sum of $50 per month for five months from date of this agreement, and $100 per month thereafter as long as the agreement is in force. If any one payment is not made by the 15th of each month, this agreement becomes null and void."

Directly below that, as Mr. Porteous has testified, is his signature, party of the first part.

Then the mining company hasn't signed.

Then below the formal signature of the mining company, which is blank, appears in handwriting, "It is also agreed that the full purchase price of $12,000 must be paid within three years from date and it is further agreed that the full purchase price

(Testimony of George J. Porteous.)

is to be paid"—no—"that the full purchase price is to be $7,000 and paid on or before M-c-h 15, 1938." Then appears "George J. Porteous." And then appears "First payment of $50 in cash hereby received." And then Mr. Porteous' signature.

(By the witness)

In accordance with this agreement I received payment every month thereafter, for, I think, seven months. The total I received under this agreement was 700. Then there were no more payments received.

By Mr. Montgomery: That is Mr. Shaw's signature on the copy of the agreement and the initials "WJS" appearing on the agreement are his handwriting.

(It was stipulated a two-page letter, dated December 4, 1936, on the stationery of National Hotel, Jackson, California, which has been stipulated to be in Mr. Shaw's handwriting, was delivered to the witness by Mr. Shaw, but he didn't accept it.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 24.")

I received this letter on the stationery of W. J. Shaw & Company, Investments, Los Angeles, dated December 4, 1936.

(It was stipulated that the defendant Shaw was negotiating these transactions and making these

(Testimony of George J. Porteous.)

negotiations with the witness as agent of Consolidated Mines of California.)

(The document heretofore marked in evidence as "Government's Exhibit No. 24" was withdrawn and marked "Government's Exhibit No. 24 for identification.")

(Document Exhibited)

(The document referred to was received in evidence and marked

"GOVERNMENT'S EXHIBIT No. 25.")

(By Mr. Norcop)

"My dear George:

"Enclosed is check for $50 as per our agreement. Please have the deeds to the two properties made out in favor of Frank S. Tyler and deposit them with the Bank of America at Jackson with instructions to the bank to deliver them upon the receipt of 5,000 shares of the common stock of the Consolidated Mines of California. It is necessary to have these made to Frank S. Tyler as he is secretary-treasurer of the corporation. Please attend to this as soon as possible.

"Kindest regards and sincerely,

"W. J. SHAW."

(Testimony of George J. Porteous.)

That is W. J. Shaw's signature which has been stipulated to.

(By the witness)

I did not make out deeds for the mines in exchange for 5,000 shares of stock in the Consolidated Mines of California. [75] I received the $50, but I didn't sign nothing for any shares, or did not take any stock at all. I was standing on the agreement that I had executed down at San Mateo. I first met Mr. Shaw in 1934 at the Grand Prize mine, which was my property. That was after the agreement was made.

Cross Examination

(Examining documents) The only contract I remember, is the one that provides for $12,000. The Ora Plata and Mineral Lode are different mines, about three or four miles apart from the Grand Prize. Plaintiff's Exhibit No. 23 covers the Grand Prize mining claim and the Grand Prize extension mining claim formerly known as the Gold Bar containing 40 acres and also the Ora Plata and Mineral Lode. They are separate claims. The one for the $6,000 is only the Ora Plata and Mineral Lode. They were both put in one agreement. I signed one copy and Mr. Shaw signed the other for the corporation, in the second group.

(The document referred to was received in evidence and marked as "Defendant's Exhibit C.")

(Testimony of George J. Porteous.)

There were four claims there. I met Mr. Shaw—Mr. Tyler was not with him, nor was his wife. The three claims were The Grand Prize, the Grand Prize extension, the Ora Plata, and the Mineral Lode, side by side. The first two, the Grand Prize and the Grand Prize extension is 3,000 feet, and the Mineral Lode and the Ora Plata is 15 x 12. I never received no royalties. I did not keep track of what was [76] going on. There wasn't no operating and milling at all anyway. They just cleaned out an old tunnel, that was on the Mineral Lode.

R. H. LYTLE

a witness for the Government, testified as follows:

Direct Examination

I live about 12 miles above Mokelumne Hill in Calaveras County. About 20 miles from Jackson. In 1933 I owned or had control of some mineral claims near my place. Those were the Pay-Day, West Extension, and the Tunnel Site. I optioned those to Mr. McKiver in 1933. He took possession of them and commenced operations. I know that after Mr. McKiver's time had about expired he made some deal with Mr. Tyler. I first met Mr. Shaw in December of 1933, at my brother-in-law's home, Bob McKisson, at Rich Gulch, a few miles below where I live now. My brother-in-law, Mr. Shaw, Mr. Tyler and, I think, Mr. McKiver were there. I don't think Mr. McKiver was present. I think

(Testimony of R. H. Lytle.)

Mr. Shaw and Mr. Tyler came over with McKiver. We talked the matter over with Mr. Shaw in regard to taking over the properties. He had an agreement written up. I said, "No, we won't take that one." "You make one out like this one that Mr. McKiver had, changing dates and names, and it will be satisfactory." This document, dated the 18th of December 1933, is the document to which I have just referred.

(The document referred to was received in evidence and marked "Government's Exhibit No. 26.") [77]

The signatures on the last page are those of R. H. Lytle, R. F. McKisson and Frank S. Tyler. This agreement is between R. H. Lytle and R. F. McKisson, both of Mokelumne Hill, Calaveras County, parties of the first part, and Frank S. Tyler, party of the second part, and this called for a total purchase price of $8,000. On the foot of page 1 the initials are "O. K. F. S. T." I can't make out what is below this name (indicating). Oh, yes; "W. J. Shaw." And then "R. H. L." is my initials. Then there is a change made in the text on page 2, the top three lines, which have been initialed. Those initials are those of Frank S. Tyler, by W. J. S. The handwriting on the cover of the agreement is mine. This contract was supplanted by a later contract.

(Testimony of R. H. Lytle.)

(By Mr. Montgomery)

We stipulate that this agreement was executed on or about the date it bears and was signed by the parties whose signatures are affixed thereto.

(The document referred to was received in evidence and marked "Government's Exhibit No. 27.")

Mr. Norcop: The next one is dated the 10th day of January, 1936 between the same parties.

(The document referred to was received in evidence and marked "Government's Exhibit No. 28.")

(By the witness)

I didn't get final payment until somewhere along about June 4, 1936. I was paid in full after the execution of this third contract of 10th of January 1936. We received a royalty of about $145, a shipment of ore was made to the Selby Smeltering Works, and interest on deferred payments amounted to $170. It was somewhere around $8300. I had operated [78] these claims myself about 1917. We operated about a year. The values of the ores I extracted at that time ran between $14 and $15 a ton. We took out somewhere around 200 tons. One of the boys had to go to war and the younger one didn't care about mining, and so it left me alone, and finally we decided to quit it. During that time we purchased a five-stamp mill. We paid

(Testimony of R. H. Lytle.)

$100 for the mill and $50 for hauling it. When we were operating there, we did not have very much dilution of the ore from the country rock. We had a small vein. I don't think at any time it was over 19 to 20 inches. The tunnel that we were working was an ordinary tunnel width, about four feet on the bottom and three feet on the top, probably from six to six and a half feet high. There were three of us men. We made a little money. After we suspended there in 1917 we leased the property to another party and he worked it awhile. That was along in 1920 or '21. After that it laid idle until I located the property. After that I leased it to a party who did a little work, and nothing came of it. I held the property prior to location, by leasing to the prior locators. I was making a living while I was at it. The first abandonment lease that I gained that was opened seriously was opened in 1933 to Mr. McKiver. The price I made to him for the property was $8,000. That was succeeded by the arrangement with Mr. Tyler. When you transfer the property, it is quitclaim deed, or something like that. I didn't have no patent. After Mr. Tyler took posses- [79] sion, I worked in the mines there. I think I took direct orders from McKiver. Now, whether Mr. Tyler was out there, whether he was the head of it, I just don't know. He was the one that had an independent lease with me prior to Tyler. I worked in the ditch tunnel.

(Describing mine and tunnels)

(Testimony of R. H. Lytle.)

We will look south through the mountain.

This is the hillside (indicating). This is the hillside, something like that. This is the ditch tunnel here (indicating). This is the ditch (indicating). That now is a utility ditch delivering the water to Mokelumne Hill and San Andreas and taken out of the south fork of the Mokelumne River. The ditch is mostly a flume along there with the exception of places. This is the ditch tunnel (indicating), the tunnel in which I worked. The mill tunnel was up the hill (indicating). Back in 1917 the stamps were placed up here at this place (indicating). Outside of the entrance. You bring the ore and dump it and the stamps stamp them. In 1933, I went in there with McKiver under the lease I gave Mr. Tyler and I worked in this ditch tunnel. I worked there from that time until about somewhere in June 1935. About a year and a half. There was a man by the name of Hogan was working with me. There was a man by the name of Barnhardt sharpening tools. I think there were some four or five of us in the tunnel, and two men on the outside. Between the beginning of the operations in December '33 and the date of June '35, there was work done up there in the mill tunnel. [80] They moved the crew and moved the pipelines and everything up to the mill tunnel. I think I made a statement that $8000 or $10,000 would show it up whether it was any good or whether it wasn't in my opinion. While I was working there Mr. Shaw visited the property

(Testimony of R. H. Lytle.)

once in a while. He told me one time that he was trying to raise about $80,000 for development of the property. I said that I thought that was a lot of money. I said I didn't know what he was going to do with it. The ditch tunnel was extended while I was working there, about 700 feet. It was in 300 feet, when Tyler took over the contract. It went on 700 feet further, a thousand feet or more. Once in a while I would take a sample for assay, but every day I panned the rock. Sometimes I would take and knock down some rock from the face of the drift and put it in a pan and take it outside and pan it in this ditch. Pan out all the loose material and save the gold in the pan. If we are taking a sample across the vein, you generally take your pick or whatever tool you use and cut right across the vein and catch the rock in a box and we take our samples that way. The samples up from the entrance to the 460-foot post in the ditch tunnel I don't believe were any good. As far as I know, from my panning, I couldn't get any gold. At the 460-foot post we struck a pretty good showing of ore. We got some very high assays out of it. One was $179 a ton. There was about a 20-foot length, not all that kind of ore. It would average about $8.00 a ton. We mined all that was in the tunnel. We did not do any stoping or drifting on that place. We were drifting tunnel. We were more interested in drifting a tunnel. The vein didn't stop. Drifting this lower ditch tunnel averaged [81] around 30 feet

(Testimony of R. H. Lytle.)

a week. The width of the vein as we went along there in some places might be a foot, 18 inches, sometimes less than that. None of that ore from this foot or more vein was separated and saved for shipment. That is, at this particular point or place. That is, we are going beyond the 460-foot point.We never shipped any raw ore out of the ditch tunnel. We milled some of it and ship the concentrates, but not from along in there. The ore that we milled was along about 600 feet in. The ore we took out at that 460 point was placed on the dump in a place where we could throw it into a car and mill it. That was milled. While I was there my old mill was partially taken down and we moved that mill down to its present position. The stamps were moved from up above. There were five stamps and we moved them down to this location here. While I was there, no additional stamps were put in. While I was there, they milled some of this ore that had been on the dump through this mill at the new location.

I think Mr. McKenry succeeded Mr. McKiver as the direct straw boss or shift boss there. He was not in charge of operations as long as I remained. I think he came there in May or June of 1934. I don't think he was there over a couple of months. He said he was a trained man in mining, He come in the tunnel and told me to start a cross cut. It was along about 485 feet, and as you face the tunnel going in, to the left; a cross cut to the

(Testimony of R. H. Lytle.)

south, at an angle going [82] off from the ditch tunnel of almost 90 degrees. It was a little over a hundred feet. No values were encountered in there. When I worked up in the upper tunnel, the mill tunnel, we run that in about 530 feet, extended it that much further than it was, making it about 700 feet. There were values of commercial character encountered in extending that tunnel. I think we extended the tunnel ahead about 20 or 25 feet and we hit a pretty good grade of ore. The smelter returns showed a return of about $40 a ton. There was a shipment made to Selby of 34 or 35 tons. I think it was along in December of 1934. We ran those mines in the wintertime—we have snow, but not enough to interfere with the operations. To extract the 35 tons of ore we mined in that mill tunnel about 20 or 25 feet. The vein was 16 to 18 inches in width. We stoped above the tunnel, maybe an average of eight or ten feet. In this particular place the walls were soft, not very hard, and then there was some dilution with non-ore bearing rock. Mr. Gilbert constructed a kind of a sorting table at the chute below the stope the roof of the tunnel, and as the ore came down on this sorting table, a man could stand there and take the waste out of it. After you knocked it down, you couldn't get a true sample of the vein matter. Samples were taken after the ore had been knocked down along with this dilution material of country rock. They were not as high in comparison with

(Testimony of R. H. Lytle.)

taking samples directly off the vein. There were no other shipments [83] of raw ore made to the smelter besides this one that I have just referred to while I was there. Concentrates were shipped. There was ore put through the mill, and that mill was five stamps, and then there was amalgum plates below the stamps, and then from there into the flotation plant. I wouldn't know what percentage of recovery we were making in the mill. I did not have anything to do with the operations of the mill. I do not know how much or what quantity of concentrates were shipped from the mill to the smelter. Somewhere along the ditch tunnel, we drove what is called a raise, or opening upward to reach the mill tunnel. That was done while I was still there. It was started from along about 485 feet. (Marking map). This is about 200 feet here (indicating). The vertical distance between those two tunnels was 151 feet. That is an adit. No ore was shipped that came out of this raise. That was allowed to drop down through here and put out on the dump. This raise was put in under Mr. Gilbert's superintendency. The mill-head is the ore before it goes into the mill, after it is passed through the crusher and through the crushed ore bin, and out of the feeder belt or table. The mill-heads assayed during the time that they were putting ore through the mill while I was there from $10, $12 to $15. Mr. Gilbert came on the job along in July of 1934. He was working

(Testimony of R. H. Lytle.)

in the blacksmith shop most of the time under Mr. McKenry.

From the very outset of the Tyler operation, after Mr. [84] McKiver had gone and after Mr. McKenry was gone, Mr. Gilbert was placed in charge. He continued until I left there along in October of 1936. That is, he was still in charge then. I was there all through '34, '35 and almost all of '36. At the present time my home place is about a mile from the mine itself. I am living right at the property, on the mine. I have a cabin.

Talking about men who are working there in these small places, while one man has the name of being in charge of operations, we don't have the distinction that they have in large mining operations between a man being superintendent and sitting there in a swivel chair. All of these men had a certain duty to do. The man in charge was the man who gave the orders.

(By Mr. Norcop)

Mr. Porteous, who preceded Mr. Lytle, informed me at the recess that he made a mistake in an answer and he desires to correct his testimony in that respect.

(By Mr. Porteous)

You asked whether I had had any discussions with Mr. Shaw before I signed my first contract on the mine. I said no, and I should have said yes. I do not remember anything particular that was said in those discussions.

(Testimony of R. H. Lytle.)

(By the previous Witness)

I was paid $4 a day. At that time that was just about miners' wages. I think Mr. Tyler was there during the early [85] period, I think up to about June 1934.

Going back to that 35-ton shipment that was made to the smelter that was taken from the mill tunnel in about 200 feet. We didn't continue to mine that section and take out ore, because the vein became smaller and there would be too much dilution the way we were mining it.—by using a machine drill and shooting, blasting with a machine. In the summer of 1935, I was in Los Angeles, and visited the offices of the company. There were discussions held there with regard to the operations of the mine, that I was present at. Mr. Gilbert and Mr. Shaw and Mr. Sampson were there, in the offices at the Banks-Huntley Building. The discussion was in regard to putting up a mill. I don't recollect very much about it, because it was an engineering talk between Mr. Sampson and Mr. Gilbert and all I know or remember is that they talked about erecting the mill. I don't know if there was a final decision made or not. The discussion pertained to the transfer of the old mill down to its present site. I think Mr. Morgan was present at that discussion. I returned then to the mines after that trip, and I was there until late '36. The five stamps were moved from up the hill down to the lower level along

(Testimony of R. H. Lytle.)

in the latter part of August or the first of September, 1935. The men who were on the job at the time did that job of moving and erecting the reconditioned mill. Mr. Gilbert was overseeing it. The mining and milling costs after this mill was erected and [86] ore was mined and run through the mill—ran around eight or nine dollars a ton. I was still there when Mr. O'Shea came to the property. He came in the latter part of October of '36. Mr. Gilbert was still there and in charge of the crew of men. Mr. O'Shea stayed there and worked as far as I know. When Mr. O'Shea came on the property, I went off. Mr. O'Shea came up with Mr. Gilbert from Los Angeles. Mr. Shaw was not there at the property after Mr. O'Shea arrived and while I was still there working. I went to make a correction. He asked me in regard to who was in the office at the time we were discussing the building of the mill. In Los Angeles here—I don't think Mr. Shaw was in the office.

Cross Examination

Mr. Morgan, Mr. Gilbert, Mr. Sampson and myself were there. Mr. Sampson was an engineer employed by Mr. Shaw or the Consolidated Mines Company. Mr. Sampson did not direct as to any of the work that was done on the mine as he came out there, and looked the situation over. I did not have any contact with him personally. I was on the property from the time that Mr. Tyler took over,

(Testimony of R. H. Lytle.)
until the latter part of October, 1936. I saw Sam Chaney. He and I did not go over the mine together. I did not give him any information with regard to it. I saw him out on the premises. I think he was there the better part of a day. I saw maps that had his name on them. The maps that he had was a map that was made by a man by the name of Johnson and who had an option on the property before Mr. Shaw took it over. I do not know anything about the maps that [87] were used in getting agreements for transfer of the Monolith stock for the mining company stock. I am able to read mining maps.

Sometimes there were 10 or 12 men working on the premises during the time that I was there. In 1934 there were six or eight men. In 1935 there might have been from 10 to 12 men. And in 1936 during the time I was there just about the same number. There was not particularly any change in the number of men there, depending on the character of the work that was done. When we were building the mill, the mining crew went outside and helped put up the mill. That is that five-stamp proposition. The mill didn't have a compressor, but there was a small compressor on the job. The equipment was a compressor and a blower, is all. The mill included the stamps, the plates and the flotation plant. They did have a compressor in the mill, too, a larger compressor later. The flotation

(Testimony of R. H. Lytle.)

plant was a system of separating concentrates. It isn't of a big tub and running water. That is flotation. They put in a certain reagent that causes the water to fall and brings the sulphites up to the top and runs them off in a bin or place to receive them, and the tailings go out another opening. That is a part of the milling equipment. This separation takes place in the flotation cells. We had a compressor there. It is a portable compressor, right at the mouth of the tunnel. The capacity was about ninety cubic feet. We had a rock drill—a black- [88] smith shop—drill steel with holes, and so forth; rails and a car. Our five-stamp mill had power. It was a gasoline engine. There were about four cabins. One was used as a change room and the others were places to live. The ditch gave us plenty of water, for the purposes that we needed it for. The tunnel is a little better than a thousand feet, had been extended from 289 feet to a thousand sixteen feet. That cross-cut was between 100 and 120 feet. Some of the tunnel samples went pretty good, and some of them not too good. There wasn't any value at all until about 460 feet. At the time we started development work there on the mine, we did not have any raises from one tunnel to another. That raise was put in with my work. I work in the tunnels. During the time that I was there we advanced the ditch tunnel from 289 to 1,016 feet. We run this cross-cut in from 100 to 120 feet. We made that

(Testimony of R. H. Lytle.)

upraise 178 feet and we drove the mill tunnel ahead from 169 to about 700 feet. We took out this bunch of ore out of the mill tunnel at the 200-foot station, and built the mill. I am speaking of the small mill that was built while I was there. The other mill was the same mill, only they added five stamps to it. There was no Diesel equipment while I was there. There was a lot of development work done after I left. While I was working there I kept a book on what happened from day to day. It was burned up. There was a fire there at the property. I think I can remember about what the development was by July [89] of 1935. We had driven the upper tunnel 707 feet. There were some shoots. A lense is a body of ore. In the shape of a lense it may be pointed at the top and widened out as it goes down, and is the same way on each end. When I say that the lense was 30 feet, I would mean it was 30 feet across. There were lenses on this property in July 1935. I have seen samples taken from shoots that would go $23. I know about the shipment of 33 tons that showed a gross of $37.26 per ton. The vertical depth of the ditch tunnel below the upper tunnel was 151 feet. This ditch tunnel never was driven easterly. It was driven westerly. It was driven 1016 feet in the tunnel. We might have made a profit on an average of $10 per ton ore.

(Examining a letter to Mr. Voget dated July 12, 1935, and signed by W. J. Morgan, executive

(Testimony of R. H. Lytle.)

vice-president, introduced as Exhibit No. 10). I wouldn't say the statements with regard to the development work there are correct. It would have been possible to have gotten those assays, but I wouldn't say they were average assays. It is not the average value of the ore.

It says here "Samples in the stope on the 100-foot shoot indicate a value of approximately $23 a ton, eliminating high assays, while the general dump samples gave $25.00 per ton. However, we recently shipped some 35 tons of this ore to the smelter"—As far as this particular place, that 100-foot shoot, that is okay. When you speak of the hundred-foot [90] shoot shows values of $38 a ton, I would assume that that was the average value, but if it is just an assay that was taken out of the shoot and out of the place, why, $38 a ton is okay. You could get it anywhere if you know the place to pick it. I think the cost of the drifting of the tunnel would be around $12 a foot. I had nothing to do with the McKisson or the Mineral Lode Mines; nor the Grand Prize Mine. As to the McKisson mine, we had a road tunnel—a mill tunnel (the pine *three* shoot), and the Menadew tunnel. And we had some stopes. I would figure about $12 a foot on the tunnels would cost about $8400 on the ditch tunnel at $12 per foot. The cross cut tunnel would cost more, about $15 per foot. That would be about $1500 more, and there was about 500 feet

(Testimony of R. H. Lytle.)

in the mill tunnel, and that would be about $6,000 more. And about, there is 178 feet in the raise at about $14.50 a foot, which I can't compute in my mind. Of course, there was other expense of building around there. $24,000 is not an over-estimate on the amount of work that was done. There may be other expenses that I haven't enumerated. (There was exhibited Samuel Emil Chaney's mining engineer, report to Mr. Frank S. Tyler, under date of October 31, 1934). There has been a house built since this was made up. You can pick up those old mills. They sell for junk. However, when I bought that in 1917, why, it is a good mill. It is just as good as it was when it came out of the foundry, as far as that is concerned. It probably cost $500 or $600 new. The mill never cost him anything, because the mill was on [91] the property. The jack hammer is all right, and the drill steel and the compressor, and the forge, and pipe. As to the other two claims—the west extension adjoins on the west end of the Pay-Day, and the tunnel site is on the east end. The tunnel site is a fractional claim. I know nothing about the Grand Prize. That is Mr. Porter's; and about 10 miles away. The Mineral Lode is in the same location. I do not know anything about the development work done there. The development work was done in a good and workmanlike manner all the time that I was there. The development work could not have been pushed in faster than Mr. Gilbert and I did it with our equipment.

(Testimony of R. H. Lytle.)

I never asked for any equipment. I don't think I ever suggested to Mr. Gilbert that he ask for it.

Redirect Examination

When I was asked about a figure of $24,000 for the tunnelling and proceeded to give the total tunnels that were in there, I did not have in mind when I gave those figures as to the lineal feet of tunnels and the raises the date of October 31, 1934. That was the complete job of tunneling and raising up to the time I left there, in late '36. I have read the letter of July 12, 1935 through. As to the statement: "Samples in the stope on the 100-foot shoot indicate a value of approximately $23 (eliminating high assays)." We did get some high assays. I don't have in mind any hundred-foot shoot. I wouldn't know where that shoot was unless you [92] could show it to me on a map. It says in the stope on the hundred-foot shoot. There is a stope there, but where we took out this shipment of ore that grossed $37 a ton. That was the stope I indicated a while ago that is above the raise here. We discontinued operations there after we took about 35 tons. As to the statement: "While the general dump samples gave $25.00 per ton." I wouldn't know. As to the statement: "However, we recently shipped some 33 tons of this same ore to the smelter and it showed a gross of $37.26 per ton." Whatever the smelter sheet shows there was the amount of ore

(Testimony of R. H. Lytle.)

taken. I think it was 34 or 35 tons. As to the statement: "a more or less continuous ore shoot —some 300 feet long has been developed on this level, the average value of which (eliminating the very high samples) is about $18 per ton." Well, I wouldn't know. I couldn't say exactly, but I have my doubts whether it would average that much. I did not have any knowledge of what the samples averaged in this raise. I never averaged them to see what they did average. I know they got some high assays and some not so high. As to the statement: "Considering the fact that we could have shown a good profit on an average of $10 per ton ore, due to our low costs of milling, we consider this report very gratifying, owing to the much higher ore values than we ever expected." It would make a small profit at $10 a ton.

Recross Examination

I did not get some assays as high as $600 a ton, but I was told they did. [93]

Redirect Examination

I said that while the mine was being worked on a small scale that money was made to a certain extent. As to whether if a large sum of money had been expended upon the mine, say $100,000, money would have been made, a profit would have been made. It all depends on how that money was spent.

(Testimony of R. H. Lytle.)

In good mining operations, on the proper directions, I think so. I think the mine could have been worked to a profit, without spending a hundred thousand dollars on it.

(Under questioning of the Court)

I would say the mine was a potential mine or a prospective mine. All of those are potential to a great extent. After the ore has been developed, then it is just like any other business. You have got to work it, and work it economically with good management, judgment, or sense is all. I think the prospects which showed during the time we operated it, during the three years, were such as would warrant men using good judgment of investing money in the mine, with the idea of making a profit.

(Under questioning of Juror Smith)

The additional stamps added to the mill was later, not while I was on the job. That is not represented in that item of $24,000, nor the Diesel engine.

Recross Examination

I know the condition of the mine today. I believe you could operate it and make it pay. [94]

Redirect Examination

It is caved in in the lower tunnel and in the upper tunnel. To clean out the tunnel before starting operations would be a nominal expense. In this up-

(Testimony of R. H. Lytle.)

per mill tunnel, I think it is 30 or 40 feet, you can get from the portal in the tunnel until you hit the cave-in. This tunnel out here was 700 feet. Down below in the ditch tunnel, we went about 700 feet. That was beyond the raise. I think the total distance was a thousand feet. I don't know the condition of the ladders and equipment in this raise. I don't know if you can get up any farther than 20 or 30 feet here. I never went up, but they can be replaced. That raise probably is intact. We looked up there together, but we wouldn't climb up there.

Recross Examination

I took them out the 12th of May, just past.

L. D. GILBERT

a witness for the Government, testified as follows:

(Discussion of Letter of April 9, 1937, to Mrs. Seeger.)

(The document referred to was received in evidence and marked as "Government's Exhibit No. 29".)

(Stipulated Mrs. Seeger would testify to receiving it through the mail.)

Mr. Norcop: And if called she would testify that she owned 654 shares of Monolith Midwest cement stock which she deposited with the stock-

(Testimony of L. D. Gilbert.)

holders protective committee. [95] I don't know that it shows when she deposited it, but the records here of the bank would show that.

Then, on October 3, 1935, she received certificate No. 308 calling for 654 shares of Consolidated Mines stock. She received that through the mails, together with a letter of transmittal.

Now, 654 shares of Consolidated is the identical number of shares she owned in the Midwest.

Direct Examination

(By the Witness)

I am a mechanical engineer. I reside in Grass Valley, California. I am employed by the Empire Star Mines Company Ltd, for the last three years. I have been working there in Grass Valley about four years. I was a little over a year out of the Lava Cap, a gold mining company, in the same district. I left the McKisson property about the middle of April in 1937. I went from there up to the Lava cap. I first became acquainted with Mr. Shaw in 1928 when I returned from Australia. Previous to 1928 when I returned from Australia my occupation was chiefly designing and building cement factories. Mr. Shaw and I had business relations before I went to the McKisson mine in 1928 or '29. Mr. Balen was promoting a cement grinding plant to be built in San Diego. It didn't go through. I went up in the mother lode country around Jackson

(Testimony of L. D. Gilbert.)

in the fall of 1933. I had had one small experience in the gold mining business in Colorado [96] a number of years ago. That, of course, was with the mechanical end. I am not a mining engineer. When I got up there around Jackson, I met a Mr. McKiver. He knew practically every property around there, we drove around the country and looked at a number of them. One was a claim that belonged to Mr. Porteous. They called it the Gold Bar and I think later it was called the Grand Prize. It was over in the West Point mining district. I wrote Mr. Shaw a letter and told him what I had seen up there and I suggested he get a few of his friends together and throw into a jackpot and we spend a little money and we might be able to develop a little mine. There wasn't very much else doing and mining looked to be something that was coming up. I think I wrote him either in the fall of '33 or the beginning of '34. I got a wire from him and he said he was going to look at it. He came up with, I think, Mr. Tyler and Mr. Shaw's wife and Mrs. Tyler. I don't remember if there was anyone else or not. I remember those four in particular. I think that Mr. Morgan was along, but I couldn't vouch for that. I believe I met Mr. Tyler before that. I first met Mr. Tyler in Mr. Shaw's office here in Los Angeles. This party of four or five arrived out from Jackson a little ways. I accompanied them over to this Porteous Gold Bar. Besides the party from

(Testimony of L. D. Gilbert.)

Los Angeles, there was Mr. McKiver and, of course, we met George Porteous over there and we all went together and went over the properties. Went over the Gold Bar. The parties [97] stayed there in the morning until lunch time. We went into the tunnel and also went down into the shaft. I think they went back down to Jackson and stayed overnight. Mr. Shaw was with me. I took my car and went over, and Mr. Shaw went with me. And after we had left there, when we were riding along, we were talking about it. The only thing Mr. Shaw asked me about was how much money it would be necessary, what I had in mind. And I said, "Probably eight or ten thousand dollars. If we spend that amount of money, we will be able to determine whether it will make a mine or not." That was with reference to the Gold Bar. I told him, "It is simply a prospect." "Well," he said, "that don't sound so bad." He said, "What would be the matter of getting three or four of them." He says, "If one proved all right and three a dud, we would still be all right."

I said, "Well, that is kind of the way the English do these things." I said, "It is all right if you feel like spending that much money." I went back into Jackson. It is my recollection that the party stayed overnight in Jackson. The next day Mr. McKiver took them over to the McKisson Mine. I don't believe I went along that time. No deal was consum-

(Testimony of L. D. Gilbert.)

mated between Mr. Shaw and I, or anyone else, with reference to any of the properties at that time, that I know of. I think they spent another day or so there and then went back to Los Angeles again. Shaw come up and they fixed up the lease on the McKisson and also one on the [98] other property, including a couple more of George Porteous' prospects that he had there. I first met Mrs. McKiver, and she told me that Mr. McKiver had started operating a small mine and was away. When Mr. McKiver came home I met him and talked shop a little. At that time I didn't know where the McKisson mine was. That was previous to Mr. Shaw's visit. We commenced to work on the McKisson Mine. After these leases were fixed up, Mr. Shaw said, "We will start the McKisson first."

Mr. McKiver already had a lease and bond on this property that was under way. It had just started a short time. I think he had only just recently started it and had only put in one or two rounds on this ditch tunnel on development work. We had a blacksmith, and there was Mr. Tyler, Mr. McKiver, myself and Bob Lytle and two or three of the local boys there. I just got a grubstake to begin with, $20 a week. Mr. McKiver was drawing the same. I think it was the same. It was to be that we were to get a grubstake and do the development work, and then each would get a 10 per cent interest in the property, Mr. McKiver and myself. As I un-

(Testimony of L. D. Gilbert.)

derstood it, it would be a 10 per cent interest in this little company. Mr. Shaw agreed to that. Mr. McKiver sort of headed the work there for a while—a couple of months or so. After he was gone, then Mr. McKenry took over. I think he was there not over two months. He was supposed to be a mining man. Mr. McKenry started in and hired a mining [99] man as superintendent—I think his name was Turner. That wasn't so very hot. After they had been operating a couple of months I got absolutely fed up on it. I got to the end of my patience, really. I went down and called Mr. Shaw on long distance telephone. It must have been some time in June or July of '34. I drove down to Mokelumne Hill. There is a booth open day and night there that we could use. I called Mr. Shaw at his residence in Los Angeles. I said that Mr. McKenry didn't know anything, and they were figuring on revamping the mill; that they were erecting it in the wrong place. The sum and substance of what I told him was, "He was crazy and didn't know what he was doing." I think Mr. Shaw wired him to come down to Los Angeles and for me to come with him. Mr. McKenry and I drove down to Los Angeles. The upshot of that trip was equivalent to firing Mr. McKenry and putting me in charge. I went back to the mine, and went on running the job there, until about December 1936. The mill was just below the mill tunnel. It was very crude. It consisted of a cam shaft, cam, stamps, and battery. There was no crusher, no

(Testimony of L. D. Gilbert.)

plates. It was just the battery, the stamp battery, old stamp in the bin right where she is sitting. After I got back up there and took charge, we went right on developing this big tunnel, drifting. When I took over the ditch tunnel had been driven in probably 450 feet or 500 feet. I think it was over 500. The raise that is shown on this diagram that Mr. Lytle drew yesterday had not been put in when I took over. I think the raise is station 4.86. That means about 486 feet from the portal. Of course, where we figured our nought plus nought [100] was out about where the blacksmith shop *eas,* because that was the original portal. It was just about right over the ditch. It was probably 50 feet from the actual portal. There was really no shop. We just had a forge set up. There was no roof over it. We put it up right away. When I went there first, Mr. McKiver had put track in the ditch tunnel. He had tracks and a car and a semi-portable compressor, a couple of jack hammers and steel, forges, an anvil and the necessary sharpening tools and things of that sort. He had only put in the ditch tunnel two or three rounds. A round is a drill length of steel and we ordinarily made three feet to the round. That is, we drilled a number of holes, six, eight, or 10, and shoot them and we would generally make a three foot advance. He had just gotten started before I took over, no development work had been done on the mill tunnel up above. As to how far

(Testimony of L. D. Gilbert.)

along did I work in the ditch tunnel before I went to the mill tunnel—we must have been in there 700 feet total. No ore was shipped out from the ditch tunnel during that time. None of it was milled. We had no mill. I went up on the mill tunnel and started driving that about three months before we shipped that ore. We must have started probably in February or so, '35. When we started work on the ditch or the mill tunnel, we drifted on through this shoot that we struck at. About 200 feet in there we struck a shoot, and then did some stoping there and knocked down some ore and shipped about 35 tons. The face of the old [101] mill tunnel when we started, we had only driven about 20 feet when we hit this shoot. I wrote that letter dated September 3, 1934, addressed to W. J. Shaw. This letter ties the thing up as to the date approximately when we started, because I think then I told them about the amount of money to take for lumber, for timbers to do the timbering to get into the mill tunnel. The only way I could fix the approximate time that I took over the job, is with my bank book. I made my first deposit August 15, 1934. But I believe I had charge a little before that.

(The document referred to was received in evidence and marked as "GOVERNMENT'S EXHIBIT No. 30.")

(Testimony of L. D. Gilbert.)

Mr. Norcop: It is addressed to Mr. Shaw. "My dear Jack." The heading is "McKisson Mine, Mokelumne Hill, R. F. D., California."

"Enclosed please find statement of McKisson Mine for the last half of August.

"You will note that I have estimated the material required, amounting to $284.20 to open the Mill Tunnel level. As I told you over the phone Saturday nite, after carefully analyzing the whole proposition, this appears to be the best course to follow to get quick returns.

"We should contact the Pine Tree shoot after driving the tunnel ahead around 30 to 40 feet. * * * " " * * * This will give us backs of about 50 feet and [102] *and* according to assays this is a fairly rich shoot and further driving will bring this under the Menadue shoot * * *"

"My understanding from our phone conversation Saturday night is that we start driving on the mill tunnel and drive thru the Pine Tree shoot and if the body of ore is there as anticipated, to go ahead reconditioning the old mill at the least possible expense and mill out this ore. Mr. Chaney"——— "* * * and Mr. Turner * * *"

"* * * Mr. Chaney and Mr. Turner agree with me that we should in this way get *out* money back even if no further ore bodies are developed.

(Testimony of L. D. Gilbert.)

This is no unnecessary work as in any event the Mill Tunnel should be driven ahead so that raises from the Ditch Tunnel level, the one we are working on now, may be brought up to the Mill Tunnel level in order to work the ore bodies below.

"In carrying on any construction work the most important point is to get the material on the job and before we can start fitting up the Mill Tunnel, this material as shown in estimate, will have to be purchased. This can all be bought in Jackson and for which we have to pay cash. To meet the payroll, purchase this material and take care of bills payable, will require $1036.96, I have cash on hand and in [103] bank $93.67 or 943.29 required. Therefore please have your bank wire their Jackson Branch say $1000.00. On account of Labor Day, I figure you will get this letter Thursday. To give you a little time, I will go over to Jackson on Friday to purchase the materials to open up the Mill Tunnel level.

"I let Mr. Turner go the last of the month. Mr. Turner's expenses amounted to $17.00 but he said that owing to the fact that Mr. McKenry made a mistake in putting him on, he would be willing to accept $10.00 for expense.

"Now if we could get McKiver straightened out things would go along in fine shape. As it is, he comes in when he wishes and leaves whenever he feels like it and I cannot depend on

(Testimony of L. D. Gilbert.)

him at all, and I am going to tell him tomorrow that he must either come regularly and put in full shift or stay away entirely.

"In order to keep a check on the disbursements, I shall send you the cancelled checks each month.

"I am keeping the invoices for gasoline in order to apply for the refund. If you have any of these invoices in your office which have not been sent in, please send them to me and I will send them all in together.

"I am,

"Very truly,

(Signed) "L. D. GILBERT." [104]

(By the Witness.)

I did get the money to push the mill tunnel along. We had to do some timbering where it had been stoped above, you see, and that was what that was for. I sent the letter dated November 2, 1934 addressed to W. J. Shaw.

(The document referred to was received in evidence and marked "GOVERNMENT'S EXHIBIT No. 31.")

(Testimony of L. D. Gilbert.)

Mr. Norcop: It reads:

"My dear Jack:

"I have your letter of October 29 in reply will say that I will get copies in duplicate of all assays run on this mine from the Mokelumne Hill laboratory today.

"Regarding shipping of the high grade ore in the shoot we struck on the Mill tunnel level: this ore could be sacked and shipped direct to the smelter but would cost us approximately $30.00 a ton over and above mining cost for sorting, shipping and smelting charges, at any rate, it would not exceed $35.00 per ton, and if we were right up against it for money, in which case anyone would be willing to pay a premium, it would be the thing to do. But here's where the difficulty arises, we cannot mine this shute and take out the high grade only. We would have to take out the entire shute, up to a point each side of the center. After mining, the ore would have to be 'cobbed' "— [105] "—or sorted, and what is selected by eye could be shipped to the smelter, the remainder would have to be piled or stored for milling after the mill is erected. You can readily see that if we ship low grade ore the cost of cobbing, shipping and smeltering charges would be a large percentage of the gross value,

(Testimony of L. D. Gilbert.)

and do not overlook the point that the royalty we are paying is on the gross."

(By the Witness.)

The royalty referred to the people that own the mine. Whatever royalty we paid applied on the purchase price.

Mr. Norcop: "I would not recommend doing this unless we are right up against it for money.

"In my judgment, the proper way would be, especially with condition as they now stand, erect the mill and if we find by careful operation and a close check on all heads and tailings"—

"—that in running this extremely high grade ore, the loss would be greater than the smelting charges, say $30.00 to 35.00 per ton, then we could pick out this extremely rich ore and send it to the smelter. The point is this uncomminuting this ore"—

"—if our tailings, in running this rich stuff, do not exceed $30.00 per ton, we are just about breaking even, whereas, if the run over $30.00 or 35.00, we would be losing the difference."

[106]

(By the Witness.)

I figured—we will say if it cost $20, we will say, let's make it $30, if it cost $50 for handling this ore at the smelter, we do it ourselves. If our tails do not exceed $30, why, say they were just $30, we

(Testimony of L. D. Gilbert.)

just broke even. That is, the loss would be no greater. In other words, we would lose it actually, and the other way we would be paying it to someone like the truckers and the railroad and the smelter. At the same time we would be out the $30.

Mr. Norcop: "You can rest assured that there would be no $40.00 to $50.00 going over the dump, because we would check our heads and tailings immediately we started operating. Peterson had just as rich ore as this and in his milling used amalgum plates losing all of his sulphides, and altho in some cases, his tailings ran fairly high, his average did not run over the smelting charges, and he still has his tailings, which when he gets tonnage, would pay to put in a small plant for treating them."

(By the Witness.)

Peterson has a very rich mine over in the mining district. It has been running a long time. It was very rich ore; about 10 miles from this property in Pine Groves just the other side of the Mokelumne River.

Mr. Norcop: "As to the milling test: If this were a complicated ore, 'yes,' but it is not a complicated ore." [107]

(By the Witness.)

Some ores are complicated. They are rather hard to treat.

(Testimony of L. D. Gilbert.)

Mr. Norcop: "It is a free milling ore, and the mill which we figure on building, would handle it without any difficulty. Were it a complicated ore, I should not think of designing a mill until mill tests had been run. You probably do not remember, but the last time I was in Los Angeles I brot up this same point with Mr. Chaney and he stated emphatically, that in this case, a mill test would not be necessary.

"Due to the terrain, we have very little room for storage without going to a big expense to erect something. In fact the little space we now have is gradually getting filled up with ore we have to take down in our driving operation. If we mined this high grade shute there would be a large percentage of the ore which would not be economical to ship to the smelter and would have to be stored until the mill is erected, whereas, were the mill built, and we found it economical to ship the highest of the high grade, it would be a simple matter. In other words, we would just skim off the cream, and not being very particular in the skimming, so as to be sure nothing but the highest went to the smelter, the rest could go thru the mill, making a very simple and economical operation, and really the [108] proper way to handle the matter. If you and I owned this mine personally, and did not have the money to build the mill, it would be

(Testimony of L. D. Gilbert.)

good business to go out and borrow it, rather than ship this ore to the smelter.

"Personally, I like Bob Lytle and have a great deal of respect for his ability as a practical miner, in fact, Bob is my right hand bower. He is on the job all the time, generally is *doen* to the mine from a half to an hour early, running pans on all quartz and thing of this sort, and we talk things over every day and mull thing over many evenings, but do not forget, that it is necessary to have some theory as well as practice, and you may rest assured I am willing and anxious to talk things over with Bob Lytle or anyone else where I think there is any benefit to be gained. However, I know a little about this game myself, and I have been in it so long that I appreciate fully the fact that every day you can learn something.

"Very truly,

(Signed) "L. D. GILBERT."

(By the Witness.)

After I wrote that letter, Mr. Shaw and I did not have any discussion with respect to shipping ore from that shoot up there on the mill tunnel. I think Mr. Shaw directed me [109] to ship the ore that was taken out of the mouth of the mill tunnel. We shipped this 35 tons. It was hauled out by trucks.

(Testimony of L. D. Gilbert.)

We had to pull it up a hill and truck it up on top of the hill where we could load it onto a big truck. The big trucks couldn't get down.

After that had been processed at the smelter to find out what the total cost of getting the net return from the smelter was, the total cost of producing the net result that comes from the smelter would be made up of the cost of the mining, the sacking and the freight, or, that is, the truckage and the smelter costs. $30 or $35 would cover everything. That would be the total cost of the mining, the smelting, the trucking, and everything in connection with it; overhead and all. That is at the mine. I saw the smelter return from this particular shipment. On Exhibit No. 12, the second sheet is the photostatic copy of the smelter return dated January 17, 1935. It run 1.16 ounces of gold, 1.55 silver per ton, no other values. The gold is worth $31.81 an ounce and the silver is worth 64 cents an ounce. The valuation was placed on it the day it arrived at the smelter, I think. That is before they actually start processing—they pay you. It is run through a sampling plant and the sample is taken and you are paid on that basis. It is probably treated later. This ore might not have been treated for a month or so. In this case here we had an umpire. His name was Hank. He is an assayer and is right down there. [110] He gets a part of the sample of the ore that is passed through the sampling plant and he makes

(Testimony of L. D. Gilbert.)

his assay at the smelter, and if there is too great a separation between them, they probably run another one and they decide on what the actual value is, because you must remember it isn't absolute. There is no such thing as absolute value of a thing of this sort and they kind of compromise. The total value of the ore was $36.91 plus 35—say $37.00 is what it actually run. This is what the ore actually was, $36.91 for the gold and 35 cents for the silver per ton. It showed there 64,283 pounds—32 tons. That return is referring to the same shipment that was taken out of the 200 foot point in the mill tunnel; the only shipment we ever made of crude ore. That is what I refer to as rich ore in my letter. After I saw this smelter report, I thought it would go higher. I was disappointed because I have gotten one sample that run over $2400 a ton. It was just a little thin streak on the foot wall. After I got the return from this smelter, I think we kept on drifting in the mill tunnel. At some stage later on there was a transfer of that old five stamp unit down below to the ditch level. That was done while I was in charge of the job. I actually did the moving of the stamps, and setting them up. There was additional equipment procured to make the mill. We got an engine and amalgam plates and three flotation units—cells; three flotation cells. I had been against the mill up to that time. I didn't think we had showings to [111] justify putting in a mill. I was directed

(Testimony of L. D. Gilbert.)

to go ahead and transfer the stamps, and recondition the mill, by, I suppose, Mr. Shaw—that is, the office. A to how that decision of putting up that mill was arrived at—I was down to the office here and we talked it over. Reed Sampson by this time was supposed to be our mining engineer. And all the mining work was done according to his direction because I told him in the office that I was not a geologist. When I was down in Los Angeles, there was present at that discussion about the mill, Mr. Shaw and Mr. Tyler; and I think Reed Sampson was there, and I think Mr. Morgan. I don't remember just exactly. I think Mr. Jacobsen was there. We were all talking. I think Chaney was there, too. The upshot was that I was directed to put up the mill.

Just so you will understand a cross-section of that mill: here is the ditch (indicating). We come over the ditch here and here is our tunnel (indicating). Here is our shop (indicating). We come right out through here on a track into a bin. We dump it right in here over a grizzly so we could break up any piece too large to be put in the crusher (indicating). We come out here into the crusher and into another bin and into a feeder, into the stamps, and then here is the battery (indicating) and amalgum plates, and into the flotation machines. This is all ground and water added. It runs about 16 per cent solid. This would be a pipe (indicating) to bring it right out to the flotation [112] machines.

(Testimony of L. D. Gilbert.)

This stuff is carried on a concrete foundation, and then there is a building here that covers it (indicating).

Now, then, we added amalgum. We added amalgum or quicksilver in here (indicating), and what we call amalgamating in the battery and then the ground stuff comes over here (indicating), and the gold is caught right on the amalgum on these plates, the free gold. Then the tailings come over here and onto the floation machines and there we float off the sulphite, and from that the sulphites run out into—in a big plant we have a filter—but in a plant like this we run out into some barrels and decant it and we shove it out in here (indicating) and let it dry.

The sulphites are black like graphite, quite heavy, and the values are quite high on the sulphites if it is pretty good ore. This is the flotation machines here (indicating). The resultant product down at the bottom on the left is the ultimate recovery. Here is your free gold in here (indicating).

And in a free milling plant you generally get about 80 per cent of your values there in free gold. The rest you get in your sulphites. Of the remaining 20 per cent that we fail to get on the amalgums we get a certain percentage of it here (indicating). We might get, say, 95 per cent of the values in this coming from here (indicating) that is left in it. You see, that might run only $2 a ton from here, we will say, and here (indicating). And we might

(Testimony of L. D. Gilbert.)

get 95 per cent of that. [113] The rest is overflow as tails; it is gone. You cannot recover any free gold in that flotation part. The free gold is all taken out. We are doing it quite satisfactorily up at the Empire right now. At that time it takes a particular reagent to do it, and if the gold is oxidized it is almost impossible, that is, if it has been weathered so that it is what same people call rusty. We mix with the liquid that comes through there after it goes over the amalgum, some sort of a xanthate and pine oils and there are all different reagents that you use. Sometimes it is a little lime and it is all according to the ore. We agitate that liquid and cause bubbles to form. In this machine, looking at the plan, there are three machines there, like that (indicating). This would be the cleaner (indicating). That stuff we take. The overflow here would go through the others and come back through again and over and over and over.

As to sampling of the mill heads—in this case we take the sample right here (indicating).

After the mill got to operating, its capacity ran 10 to 12 tons a day. We went on mining and extracting ore and putting it through the mill there for some time. This belt conveyor here that fed the stamp battery, every half hour we would take a grab sample of that and put it in a powder box, that is, we divided it up into three eight-hour shifts. It was corded up and we made an assay on it. We

(Testimony of L. D. Gilbert.)

did the same thing out here what was called the tails, and the [114] difference between those is what we should have extracted. I remember once we got a $40 head assay. That was the highest. I think we never quite averaged $10, because we figured that if we could average $10 it was just about the breaking point. That, to me, was a little margin, but we would be pretty close if we didn't go at least $10. While Mr. McKenry was there, the mill was not running. I never had a copy of the engineer's report that Mr. Chaney or Mr. Sampson made. I saw the map. On that map I saw the various points on the map where certain assay values have been found. That is the way they are made, that is an assay map. I don't remember that I compared the assays, but the amount of ore, because I think it was—I wondered how I could estimate it because, after all, you are on one side only and it is pretty hard to judge where these shoots show and how they would hold up and what the values would be. We were always hopeful, however, that we would get the rich ore. If I didn't make it go, I was just stuck for all my time. I just got a grubstake on the thing. Mr. Shaw and I did not have any discussion about any phase of Mr. Chaney's report. I knew there was a report. I remember Mr. Shaw told me that Chaney made a very nice report. I was around with him when he was up there. I met him. I know him. I got acquainted with him at that time.

(Testimony of L. D. Gilbert.)

(Examining a processed letter on the Consolidated Mines stationery, dated September 16, 1935.) **[115]**

I have seen this letter before. The signature down at the bottom is a reproduction of my signature. I signed the original.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 32.")

The original of this mimeograph as taken off was prepared down here in the Los Angeles office. There was present, I think Mr. Shaw, probably Mr. Tyler, probably Mr. Morgan, Mr. Jacobsen, I suppose on that date. We just talked around on those lines. Of course, they were all anxious to, that is, in wishful thinking—I was a little more like the Missourian, you had to prove it to me, but I had two engineers that said everything was all right, although I couldn't quite see it myself, I still had my doubts as to whether the thing would make a paying proposition. But like Chaney and Mr. Reed Sampson, they are both mining engineers and geologists and, of course, they had a certain amount of weight, their judgment, over mine, although what I had seen there I couldn't see how we could really make a very good paying proposition. There was no discussion as to whether this letter was to be

(Testimony of L. D. Gilbert.)

sent out to all of the stockholders. There was no discussion as to what the letter was prepared for.

GOVERNMENT'S EXHIBIT No. 32

(By Mr. Norcop)

"September 16, 1935

"Board of Directors,

"Consolidated Mines of California. [116]

"Gentlemen:

"Complying with your request for a report of the results obtained to date on the McKisson property, I beg to advise you that the work on the construction of the mill has already begun and while I anticipate that we will be in production by November 1, I feel certain that it will not be later than November 15.

"As per instructions, plans for the construction of the mill are with the thought that our production can soon be stepped up to about 900 tons a month. I believe I am conservative when I say to you that when this point is reached, this property can easily net us $10,000 per month"—

(By the Witness)

It was my understanding that this five-stamp mill would be the pilot mill and the ball mill would double the output. We could get better extraction

(Testimony of L. D. Gilbert.)

and we would double the output, so we would run around 25 tons a day. In this letter, there is not any reference to the possible building of a ball mill to supplement the pilot mill. That was the original lay-out. I got the floor plans of this thing and I laid the whole thing out, including the ball mill.

(By Mr. Norcop)

"—and if developments progress as I anticipate, the returns can be a great deal more. [117]

"Since we first started the development work on this property in February, 1934, I feel that we have made consistent progress. While at times it may have seemed to outsiders that the work was proceeding too slowly; still, since all of us know the hazards that usually surround the development and mining of gold, we wanted to be absolutely certain of our position. In other words, it was felt advisable to delay production and assure the fact that we had sufficient ore of commercial value to justify our going ahead.

"The investment of a substantial amount of money since we started is amply reflected in the large amount of tunnel work done and the values we have developed. Our values are proving to be much higher than we had anticipated."

(By the Witness)

That was my statement. We got into this fine shoot of ore right at that particular time in the

(Testimony of L. D. Gilbert.)

ditch tunnel. Just a little beyond the raise there, there was a big fault, and on the other side of the fault we run into this fine body of ore.

(By Mr. Norcop)

"—and therefore our percentage of profit can be materially increased over the amount we originally expected. [118]

"Everything done to date has been with the thought of developing a profitable gold property. I feel sure that the results achieved will be gratifying to yourself and your associates.

"Respectfully yours,

"L. D. GILBERT (signed)

"Superintendent of Mine."

(By the Witness)

I dictated part of that letter. We talked this over. The whole letter is my opinion and belief at that time. And, of course, I was governed a good deal by their own opinions. I didn't put anything in there that I believed would catch the stockholders. Heavens, no, I wouldn't do anything like that. The approximate location of the ditch tunnel where we found that rich ore that I was referring to when we prepared the letter, just beyond the raise. We drifted on through it. We had it four feet wide in some places, the widest we ever struck.

(Testimony of L. D. Gilbert.)

The vein, and the values showed up pretty well. As I remember it, the total length of the shoot was about 150 feet. None of that ore was shipped to the smelter. The ore that we took out of there when we were drifting, we stored in the cross-cuts because we had filled in outside—remember, this is steep hillside and we had no room to store anything hardly. We milled it later. It didn't turn out very good. It didn't turn out nearly as good as we thought it would. Some streaks in there [119] were very rich and there was quite a bit that was low-grade. I really left the job about Christmas of 1936. That would be just before the first of the year '37. Mr. O'Shea took over the job when I left. Bob Lytle was not working with me up until I quit. Discussion was had between Mr. Shaw and I about Mr. Lytle's departure. I don't think it was a conversation; I wrote Mr. Shaw about it. I got a verbal reply from him. There was no discussion between Mr. Shaw and me when I discontinued and left the property. I felt that all of the stockholders felt—you know, a mine, if it doesn't pay, it is always the manager's fault. Although Jack, I think, or Mr. Shaw, really felt I had handled it just as good as anyone, at the same time I thought I would like to see somebody else try it. I did my best and I couldn't make a go of it. So they got Mr. O'Shea. I took him up there and he was up there a couple of months before I left.

(Testimony of L. D. Gilbert.)

(Questioning by Juror Daniels)

I did not say that I quit this management after I found out that they couldn't make a go of this mine. We talked about it, see, and of course, naturally, the directors and all that, they—I knew they felt that way. I assumed they did. So I welcomed Mr. O'Shea. We hadn't made any dividends yet, and of course, naturally, the manager is at fault.

(Questioning by Juror Schumacher)

We milled for quite a little while. We started just a few days before Christmas of 1935 and we run on through. [120] We had a few interruptions. Once or twice we stopped during bad storms. We had a ditch go out and didn't have any water, but we endeavored to operate straight on through. We got about 300 tons a month at an average of $10 a ton. If we had additional investment, we could have gotten to the 900 tons. You see, we assumed, with the ball mill, that it would double the output of the present mill.

(Questioning by Juror Hippard)

That was not on the basis of eight hours a day or 24 hours a day, but around the clock, Sundays and all, that is, the mill.

(Questioning by Juror Schumacher)

It took three men on the mill, one on each shift. With a mill twice the size of that it wouldn't take

(Testimony of L. D. Gilbert.)

any more men. We operated a 400-ton mill on some other property with one man to a shift. As to whether we would have more men working in the mine—that is all according to how difficult the mining is. If it is easy going, a miner can get out three or four tons a day, and if it is hard going, maybe only one ton a day. As to cost of operating per day to produce 10 or 12 tons of material, how many men would it take all together—You can figure that the payroll is just about half. You can take your payroll and double it and get a close estimate of what your costs are. For instance, say your labor runs $5 a ton—that is pretty high, of course —your total would be about $10. That is just to get a rough estimate of where [121] you are. Six men could produce six to ten tons a day and run it through the mill. Plus the mill crew. The mill crew is separate from the other.

Cross Examination

I felt that if they had the ball mill, if they put up the big mill they were figuring on to begin with, that it could be made to produce a profit on a larger scale, you can do it on a closer margin. For instance, in the Empire Star Mine, we have a mine that runs ore less than $2 a ton and we make money on it. The low-grade ore can be made profitable by magnitude of operation. Quantity is what you need. You get the bigger divisor and lots of it, you can work on a small margin because your labor costs

(Testimony of L. D. Gilbert.)

don't run up in proportion to the tons, by any means. The original plan was to put up a mill that would handle about 25 tons a day. That is conservative. Of course, until you operate on a certain ore, you don't exactly know what tonnage you get through. Another thing, it is governed on how fine you have to grind, and that can only be determined by actual practice, or by actual operation. That is one reason they put in a pilot mill, to find out just how fine you had to grind. We might have a dollar go through in tails and if it costs $1.02 to get the values, we had better let it go because we would lose money. There is a point where they cross, that is, if you grind it finer, your costs of operation would run higher than the extra recovery you would get. It is difficult to [122] determine. The finer you have to grind, the more mill cost you have and, of course, less the output. I saw the mill that was installed after I left once on a visit one Christmas. I went down there and looked it over. It has another five stamps and a Diesel engine, another compressor. In fact, it was doubled, I would say, the output was doubled.

Redirect Examination

During the time I was running the job, if we operated at a profit, it was a very slight one all the time I was there.

(Testimony of L. D. Gilbert.)

Recross Examination

We were doing a great deal of development work while I was in there. As I looked at it, we weren't mining; we were simply developing, and the ore we got in the development work, we run through the mill, and we charged that against our costs.

Redirect Examination

You never get out of the development stage on a mine. Here we hadn't gotten to the point where we had enough ore developed to run it through on a big scale. It takes lots of work.

Recross Examination

While I was there, I don't think we ever got to the point where the mine was developed enough to be able to mine the necessary ore to accommodate a larger mill at that time. It was necessary to run our tunnels and develop our different [123] bodies of ore before we located that mill. You have to get the working places, and we hadn't arrived at that point. Your mill doesn't do you any good to have it lay idle unless you are assured of a regular and continuous output to keep the mill going. I figured when the point came when the mill no longer could keep up by running three eight-hour shifts a day, and were it possible to get out more ore, then is the time to add more grinding capacity to the mill. Unless you get to that point, there is really no reason to increase the capacity of the mill.

(Testimony of L. D. Gilbert.)

(By N. E. Hesla, of Internal Revenue Dept).

I have here the original tax returns filed by Edna F. Shaw, Pacific Palisades, Los Angeles, for the years '34, '35, and '36; the original tax returns filed by William J. Shaw, 634 South Spring Street, Los Angeles, for the years '34, '35 and '36; the joint returns filed by William J. Shaw and Edna F. Shaw, Pacific Palisades, for the year 1937; the original returns of Frank S. Tyler, 848 Nineteenth Street, Santa Monica, for the years '35 and '36; the original return of W. J. Shaw & Company, 506 Bay Cities Building, Santa Monica, for the years '35 to '38, inclusive; the original return of Consolidated Mines of California, 506 Bay Cities Building, Santa Monica, from the date of incorporation, September 1934, to December 31, '34, and the years '35 to '37, inclusive; the original return of Consolidated Mines of California, Inc., for the year 1938, and a partnership return filed by Frank [124] S. Tyler and associates, 634 South Spring Street, Los Angeles, for the year 1934. (Copies marked as follows)

Edna Shaw's income tax for '34, '35, '36 were marked Government's Exhibits Nos. 33, 34 and 35, for identification.

W. J. Shaw's income tax for '34, '35, '36, '37 were marked Government's Exhibits Nos. 36, 37, 38 and 39.

Mr. Tyler's income tax for '35 and '36 were

marked Government's Exhibits Nos. 40 and 41, for identification.

W. J. Shaw and Company income tax for '35, '36, '37, '38 were marked Government's Exhibits Nos. 42, 43, 44 and 45.

Consolidated Mines of California's income tax for '34, '35, '36, '37, '38 were marked Government's Exhibits Nos. 46, 47, 48, 49 and 50, for identification.

Tyler and Associates income tax for '34 was marked Government's Exhibit No. 51 for identification.

JULIA SCHUMACHER

a witness for the Government testified as follows:

Direct Examination

I live at 2015 Willamette Street, Eugene, Oregon. My husband and I were owners of 120 shares in the Midwest Companies. I never heard of the Tyler agreement. I heard of the Consolidated Mines of California. On March 16, 1936, when Mr. Tyler called at my home, I had a conversation with him at that time. During this conversation just Mr. Tyler and I were present. He begun by reviewing the Monolith trial, taking it step by step just as it had been going on. Then [125] he told me about Mr. Burnett. And Mr. Burnett had in his possession a great amount of the Monolith stocks and with all the expenses of this trial there seemed very little

(Testimony of Julia Schumacher.)

hopes that this Monolith stockholders would have anything when it was all settled up. We understood that this gold mine has just been found, the gold was all there, all they needed was the money to bring it out and put everything in operation and bring this gold onto the market. And we were to have dividends by the first of January, 1937. I said, "Well," I didn't want any more gold mines because my husband had one in Arizona and he also had an oil well in Montana.

Well, then he asked me to give him the Monolith stock. And I said the Monolith stock was all in the bank in a box.

Well, could I get it?

"Yes, I could, but I wouldn't."

Well, he made a point that he had to get out of town that day because he had so many places that he must visit that day before 8:00 o'clock.

I refused to get the stock.

"When will Mr. Schumacher be in?"

I said, "Half past eight,"

"What time can I see him?"

I said, "You may see him by nine o'clock or a quarter after nine."

Mr. Tyler returned. I heard Mr. Schumacher put a question to Mr. Tyler, and I sat there and I didn't have much [126] to say. And finally Mr. Schumacher turned to me and he said, "Mama, what do you think about it?" "Can you go to the bank in the morning and get the papers?"

(Testimony of Julia Schumacher.)

I told him I could, but I didn't want to; but if he wished me to, I would do it. So all arrangements were made that I should go to the bank. I went to the bank and I got the papers and I signed them and he took them. We got 120 shares of stock in the Consolidated Mines of California for our Midwest stock. The same amount as the Monolith. I had known of Mr. Morgan prior to Mr. Tyler's visit, through reading the letters that Mr. Morgan wrote to Mr. Schumacher. I had not had business dealings with him directly, but through this Monolith committee. We had full confidence in him. Mr. Tyler called on Monday and he called again that evening, and of course he called the next morning to take me to the bank and he brought me back and then he called again. Then he called the latter week of June or the first week of July. As to these stocks of the Monolith that was traded for the Consolidated Mines—Mr. Schumacher and I shared everything jointly, joint survivorship. I signed those.

(Letter stipulated to having been received through the mails).

(The document referred to was received in evidence and marked as "Government's Exhibit No. 52.") (Subject to Objection).

Cross Examination

We bought this Midwest stock in the early part of 1929. [127] We obtained nothing from it.

EVA M. GOODRICH

a witness for the Government, testified as follows:

Direct Examination

I live at 1336 West 47th Street, Los Angeles. On or about the 1st of June 1937 I owned some shares of stock in the Midwest Company. I traded them for Consolidated Mines. As to stock certificate No. 742 calling for 18 shares of Consolidated Mines of California which appears to be issued in the name of J. C. Goodrich and E. M. Goodrich, joint tenants, with full right of survivorship, which certificate is dated the 8th of June 1937, and appears to be signed by Frank S. Tyler, secretary, and bearing, apparently, the rubber stamp signature of H. L. Wikoff, president. I received the stock certificate in this envelope through the United States mails, postage prepaid.

(Certificate and Envelope offered in Evidence).

(Objected to on the ground that there is no foundation for it, no connection of Mr. Shaw with any deal of Mr. Tyler with respect to selling stock of this character).

(The document referred to was received in evidence and marked "Government's Exhibit No. 54.") (Subject to reserved Motion to Strike).

(Testimony of Eva M. Goodrich.)

Number 742 — Shares ***18***

Incorporated under the Laws of the State of California

CONSOLIDATED MINES OF CALIFORNIA

Capital Stock 1,000,000 Shares

No Par Value

Full Paid, Fully Voting and Non-Assessable

This Certifies That ***J. C. Goodrich and E. M. Goodrich, Joint Tenants with full rights of survivorship*** is the registered holder of ***Eighteen *** Shares, being the shares represented hereby, of Consolidated Mines of California hereinafter designated "the Corporation," transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the seal of the Corporation and the signatures of its duly authorized officers, this 8th day of June, A. D. 1937.

(Seal)

H. L. WIKOFF
President
FRANK S. TYLER
Secretary

(Testimony of Eva M. Goodrich.)

(Registered envelope)

(from)
Consolidated Mines of California
634 South Spring Street
Los Angeles, California

(to)
Mr. J. C. and E. M. Goodrich,
4532 S. Wilton Street,
Los Angeles, California.

Registered 202095

Return Receipt Requested Fee Paid

(There was offered a certification by the Securities and Exchange Commission that the stock of this company was neither registered with the Commission nor any exemption [128] granted by the Commission to the registration of the same.)

Mr. Montgomery: We have no objection to the certificate as proof of the facts it states, but we object to any proof of the fact with respect to this defendant Shaw on the grounds heretofore stated, that he hasn't been connected with it.

The Court: Subject to that reservation the objection will be overruled and it may be received in evidence.

(Testimony of Eva M. Goodrich.)

(The document referred to was received in evidence and marked

"GOVERNMENT'S EXHIBIT No. 55.")

(Subject to reserved Objection.)

(By Mr. Norcop)

"United States of America
"Securities and Exchange Commission

"I, Francis P. Brassor, Secretary of the Securities and Exchange Commission, Washington, D.C., which Commission was created by the Securities Exchange Act of 1934 (15 U.S.C.A., Sec. 78a et seq), and official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission, pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, do hereby certify that:

"A diligent search has this day been made of the books and records of this Commission, and the books and records do not disclose that any registration statement has ever been filed with [129] this Commission under the name of Consolidated Mines of California, pursuant to the provisions of the Securities Act of 1933 and/or the Securities Act of 1933 as amended.

(Testimony of Eva M. Goodrich.)

"In witness whereof I have hereunto subscribed my name and caused the seal of the Securities and Exchange Commission to be affixed this 13th day of May, A.D., 1941, at Washington, D.C.

"FRANCIS P. BRASSOR
"Secretary."

Affixed thereon, as you can see, is the seal in due course.

A. E. GARDNER

a witness for the Government, testified as follows:

Direct Examination

I live at Porters Grove, Oregon. I haven't any business or occupation, at the present time. I was a shareholder in the Midwest Company. I owned 304 shares. I put these shares up with this Monolith committee, and contributed my 50 cents a share. I first became acquainted with the Consolidated Mines of California in March in 1936. Mr. Tyler called at my home. No one was with Mr. Tyler when he called at my place. I did not have a conversation with Mr. Tyler at that time. We made an appointment to meet him—he called one day and we made an appointment to meet him the next day in Portland at the Heathman Hotel. We met him the next [130] day. My wife was with us, and Mr. Tyler.

(Testimony of A. E. Gardner.)

We were given to understand that if we ever got anything out of our Monolith stock, we would be well to exchange it for stock in this mining company. I had not known Mr. Morgan prior to this conversation, except through correspondence; as he handled the Monolith stock for the Monolith Committee. Mr. Tyler gave us to understand that Mr. Morgan sanctioned this deal and had furnished him with names of the Monolith stockholders that would be allowed to exchange their stock for shares in the mining company. Mr. Tyler had written evidence of the mine and some of the assays and pictures of the mine. I think he did show me some papers that showed assay values. The money they were getting from the stock in exchange was supposed to go to develop the mine and put it in operation. I don't think any date was mentioned as to when we were to expect dividends from the mine —shortly, was about all there was to it. I did not have any gold mining experience prior to this deal. I did not visit the location of the mine and look it over. I don't think I saw any engineering report on the mine. I did not rely entirely upon what Mr. Tyler told me. I did exchange my stock. What I relied upon that caused me to exchange my stock was, I saw Mr. Morgan's signature on some of the stock certificates as president of the company, and I had all the confidence in the world in Mr. Morgan.

(Letter is produced) [131]

(Testimony of A. E. Gardner.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 56.") (Under stipulation as to being sent through mails and received and subject to Objection.)

Cross Examination

That was Midwest I had. I think Mr. Tyler represented then it was worth $2.50. It didn't have par. I think about 1929 or '30, along in there is when I got it. I never received any dividends on it. Until Mr. Tyler told me it had some value, I had given up all hopes.

LOUIS R. JACOBSON

a witness for the Government, testified as follows:

Direct Examination

I am a certified public accountant in California. I have been certified in this state. I first became acquainted with Mr. Shaw in October, 1934, in the Banks-Huntley Building. Mr. Gregory introduced me. Mr. Shaw at that time told me he needed someone to take care of his accounting matters and assist him in such projects as he then thought he was going to carry on. He didn't go into any detail at that time as to what he had in mind, but he felt he could make use of me in assisting him. That is about all.

We had general discussion as to what my work

(Testimony of Louis R. Jacobson.)

was and what my experience, and so forth, was. Nothing was said in this conversation about whether I would be a part-time employee or a full-time employee. No arrangement was made [132] as to compensation. I commenced work in October, 1934, immediately after our conversation. I put in full time, practically, in those offices.

There were no books or records of any kind maintained at the office, with the exception of some, I will say, existing records covering the original Monolith Stockholders Committee, which had ceased functioning at about that time.

While I wasn't given any instructions of any kind as to what to do by Mr. Shaw, I found it necessary to build up whatever records were necessary pertaining to the moneys that had been deposited in banks and disbursements, and both the accounts of W. J. Shaw, Frank S. Tyler and Edna Shaw, and I found that there had been certain collections made or, rather, a partnership agreement had been formed as between Frank S. Tyler and a group of individuals. They had turned in certain stock, Monolith Portland Cement Company stock, both common and preferred, and also cash, all of which information was shown on these various partnership agreements. There were two or three copies—I believe there were three copies—and from that information as shown on these lists I prepared the necessary schedules showing the amount that each and every

(Testimony of Louis R. Jacobson.)

individual had turned in to Tyler on the partnership agreement. I built up those entries on a columner form white sheet book, a looseleaf binder.

The first part of the record, they had one or two sheets for the cash receipts and disbursements of that of Edna F. [133] Shaw. Then there was a section contained therein for the cash and receipts of Frank S. Tyler, covering his bank account at the California Bank. And then we had some sheets of W. J. Shaw's personal account, that is, receipts and disbursements, and those were prepared and maintained continuously during my connection with W. J. Shaw. There was also a section containing the names of the individual stockholders in the Consolidated Mines, showing their individual investments, whether it was Monolith stock or cash, or any other securities which they may have turned in, and then there was also a cash account, cash receipts and disbursements records for W. J. Shaw & Company, and analysis sheets of various kinds telling the amounts in money that had been expended for account of the properties. I commenced this work in October, 1934. But I worked back to January 1, 1934.

I think there was a bank account with the California Bank, Main Branch, on Spring Street, which account has maintained the deposits and disbursements of Frank S. Tyler. There also is an account there for W. J. Shaw. I believe Edna F. Shaw's

(Testimony of Louis R. Jacobson.)

account—yes, her account was also maintained at that bank, at the California Bank, Main Branch. I don't believe there was any account at that time of W. J. Shaw & Company. A section of this so-called black book contained records for W. J. Shaw & Company. There was a record in the office when I arrived showing that a bank [134] account was maintained in the Bank of America at Jackson, California. That account changed back and forth—Mr. McKenry, Mr. Tyler, and I think McKiver. Now, I am not sure as to whether or not Gilbert had started working for the company in 1934. If he had, then the account would have been changed over to his name, because that account was more in the nature of a petty cash account; as they required money for miscellaneous expenditures, funds which have been advanced from the Los Angeles office to the Bank of America at Jackson.

During the time that I was making entries in this black book, I did not have any occasion to make any entries in there pertaining to the Consolidated Mines of California, a corporation. Consolidated Mines of California, a corporation, after its incorporation did open a bank account. I believe they had but one in Los Angeles. There was a record shown in the black book where moneys were expended and reflected in the account for and on behalf of the mine up at Calaveras County. Those moneys appeared in the Frank S. Tyler account, and also Edna F. Shaw account. I reconciled the bank

(Testimony of Louis R. Jacobson.)

account after I got through making all the entries in the cash book. In reconciling the bank account, I made use of check stubs, cancelled checks, deposit slips which I found in the safe, and also the bank statements. After I had finished just using those records in making my reconciliation in opening my book, I put them back in the safe. They were kept there, [135] to the best of my knowledge. I actually opened the books of account for the Consolidated Mines of California, January 1, 1936. I opened and maintained for that corporation commencing on January 1, 1936, cash receipts, cash disbursements, journal, payroll records, general ledger. I had been working there approximately a couple of months in '34 and all of '35; that is about 14 months before I opened the books for the corporation. Before I opened the books for the corporation, I know of my own knowledge the Consolidated Mines of California had been incorporated. And had received a permit from the Commissioner of Corporations of California. And certain transactions had gone on in connection with that permit. So far as the issuance of stock—it is my recollection that a second permit had actually been issued along later in November, I believe it was, before I opened the books.

Mr. Norcop: And in that connection we have here the records of the Corporation Commissioner, and I think it would be proper rather than to ask the witness to refer to records—you have seen them,

(Testimony of Louis R. Jacobson.)

Judge Montgomery—I am going to refer to the first permit.

The first permit bears the date February 15, 1935, and recites that "this permit is issued upon the following express conditions: that a true copy of this permit be given to the subscriber prior to the taking of subscriptions," and it recites the name of the corporation and states that the authorized [136] capital of $500,000 is divided into 2 million shares at a par value of 25 cents each, none of which has as yet been sold or issued.

It goes on to say, "The corporation has not yet commenced business and, therefore, has neither assets nor liabilities," that it was organized for the general purpose of engaging in the mining business and particularly to acquire through purchase contracts two groups of mining properties in Calaveras County, California.

The first group is described as the McKisson property and covers three unpatented mining claims situated in the Glencoe mining district known as the Pay-Day claim, Tunnel Site Claim, and West Extension Mine. There is a balance due on the purchase price of these claims of $8,000 payable October 27, 1935.

Then it mentions the second group of mines which we know from the evidence as the Porteous claims, saying there is a balance of $14,000 due on the purchase price of those claims which is payable out

(Testimony of Louis R. Jacobson.)

of 15 percent of the gross returns. It refers to a report by S. E. Chaney, a mining engineer, and indicates that these properties are worthy of development. "Applicant represents that sufficient ore has been blocked out to enable it to commence milling and shipping from the McKisson property immediately."

"Applicant proposes to issue 900,000 shares to Frank S. Tyler, who with his associates, has already expended $26,588.- [137] 49 in developing the aforesaid properties, in consideration for the transfer and assignment to applicant of all his right, title and interests therein and thereto.

"In order to provide capital with which to fully develop the properties, including the purchase price of the McKisson property and the erection of a mill thereon and the erection of a mill and equipment on the Mineral Lode and Grand Prize claims" —those being the Porteous claims—"applicant proposes to sell and issue 320,000 of its shares at par, for cash, subject to a selling expense of not to exceed 20 percent of the selling price."

Then here is what was granted, the granting part of the permit, naming the corporation again:

> "It is hereby authorized to sell and issue its securities as hereinbelow set forth:
>
> "1. To sell and issue 106,352 shares of its capital stock to Frank S. Tyler as partial consideration for all of his right, title and interest

(Testimony of Louis R. Jacobson.)

in and to the mining claims and other assets described in its application, first, to be transferred and assigned to the applicant, subject to liabilities not exceeding in the aggregate $22,000, and to current taxes not delinquent, rights, easements, reservations and restrictions of record.

"2. After the applicant shall have sold, [138] received the consideration for, and issued all of the shares of its capital stock in accordance with the issuance paragraph 1 hereof, to sell and issue an aggregate of not to exceed 320,000 shares of its capital stock at par, for cash, lawful money of the United States, for the uses and purposes recited in this application, subject to an aggregate selling expense of not to exceed 20 percent of the amount received in cash on account of the selling price, including commissions payable only to duly licensed brokers or agents.

"3. Whenever and as often as a share or shares of its capital stock are sold and issued in accordance with issuance paragraphs 1 and 2 hereof, to issue a certificate or certificates evidencing a like number of shares of its capital stock to Frank S. Tyler, not exceeding in the aggregate to him, however, 426,352 shares of its capital stock, as further partial consideration for the assets described in issuance paragraph 1 hereof, subject to his right to receive an addi-

(Testimony of Louis R. Jacobson.)

tional 367,296 shares of its capital stock as full and final consideration therefor, under future permits when and as granted by the Division of Corporations." [139]

(By the Witness)

No action was taken by the corporation under this permit, insofar as any of the books and records of the company were concerned. No stock was issued or sold.

Mr. Norcop: Now, we refer to the second permit, which is dated July 5, 1935, several months later, and omitting now some of the formalities, the permit comes down to a point very quickly:

The corporation "is hereby authorized to sell and issue its securities as hereinbelow set forth:

"1. To sell and issue 150,000 of its no par value shares to Frank S. Tyler as partial consideration for the transfer and assignment of all right, title and interest in and to the certain mining claims and mining equipment described and referred to in the applications heretofore filed by the applicant.

"2. To sell and issue 300,000 of its no par value shares to Frank S. Tyler as full and final consideration for the property referred to in paragraph 1 hereof. This permit is issued upon each of the following conditions:

"(a) That none of the shares authorized by paragraph 2 hereof shall be sold or issued

(Testimony of Louis R. Jacobson.)

[140] unless and until the applicant first shall selected an escrow holder"—and there will be no point made of that. They did.

"(b) That none of the shares herein authorized by paragraph 2 hereof shall be sold or issued unless and until Frank S. Tyler shall have executed an agreement in writing with said applicant, and filed a copy thereof with the Commissioner of Corporations, whereby he or they shall in effect agree for themselves, their successors, administrators and assigns as owner of 300,000 shares herein authorized to be issued to him or them, to waive his or their rights to participate in any distribution of capital assets of the applicant, while said shares shall have been required to be held in escrow * * *

"(c) That none of the shares authorized by paragraph 2 hereof, shall be sold or issued unless and until Frank S. Tyler shall have executed a written waiver, and filed a copy thereof with the Commissioner of Corporations, for and on behalf of himself, his successors, administrators and assigns, wherein he waives, as the owner of 300,000 shares herein authorized to be issued to him under paragraph 2 hereof, his right to the payment or accrual [141] of any dividends in any year, while said shares shall be required to be held in escrow, until such

(Testimony of Louis R. Jacobson.)

time as all other shareholders shall have received dividends equal to the entire amount of their investment."

That unless sooner revoked, suspended or extended this permit shall expire on the 5th of January 1936. That is some seven months later.

(By the Witness)

In connection with that second permit which authorized the issuance of 300,000 shares to Mr. Tyler to be placed in escrow, that was done. In connection with the authority of that permit to issue 150,000 additional shares to Mr. Tyler—that was not done, in the manner outlined in that permit. 60,000 shares, as I recollect, was issued to Frank S. Tyler and the balance was issued to various individuals who were members of the partnership. The balance of the 150,000, they were issued in accordance with that certain partnership agreement showing the names of the respective interests which they had. That partnership agreement recites that 40 per cent of the assets of the partnership will be owned by Mr. Tyler in consideration for certain things he was to turn over, and the other 60 per cent belonged to the partners who had subscribed their names at the foot of the document.

This 60,000 shares is exactly 40 per cent of the 150,000 [142] shares, so that left the balance of

(Testimony of Louis R. Jacobson.)

90,000 shares—which would be apportioned to the 60 per cent of the partnership. I have seen the individual stock books, but I didn't check any of them though. Upwards of 67,000 plus shares were issued to individuals who had been partners—some 125 of them, I believe—in the partnership with Mr. Tyler. I don't know what became of the balance at that particular time. I don't believe the issuance of all of the stock at that particular time had been completed when we received an order from the Commissioner, that the issuance of the stock was in error. The third permit, after some hearings before the Commissioner, was issued. I don't believe they were printed.

Mr. Norcop: Now, this says, "Permit No. 3"—same corporation—"is hereby authorized to sell and issue its securities as hereinbelow set forth:

> "1. To sell and issue to the persons named in an instrument designated as 'Exhibit A' filed on February 15, 1936, an aggregate of not to exceed 90,000 of its shares for the purpose and consideration recited in the original application.
>
> "This permit is issued upon each of the following conditions:
>
> "(a) The shares herein authorized to be sold and issued shall be sold and issued only concurrently with or subsequently to the surrender [143] and cancellation of certificates evi-

(Testimony of Louis R. Jacobson.)

dencing the ownership of 90,000 shares heretofore issued in non-conformity with the permit granted to applicant on July 5, 1935."

Mr. Norcop: I now come to Exhibit A which the permit just referred to as being a part of the application, and upon which basis the authority was granted to issue 90,000 shares, and I find that that Exhibit A is six pages long, five full ones and about a third on the sixth page, listing not alphabetically but names headed "Name," and then below that comes the name of the individual, and over to the right "Number of Shares Desired to be Issued," and then the number of shares, and those total 90,000 shares.

(Books containing Certificates Nos. 1 to 100, Nos. 101 to 200, Nos. 201 to 300, Nos. 301 to 400, Nos. 401 to 500, Nos. 501 to 625, and Nos. 626 to 750 were marked Government's Exhibits 60, 61, 62, 63, 64, 65 and 66 for identification.)

By the Witness:

The books of record of the Consolidated Mines of California were opened by me personally by February 1, 1936, and they were kept by me. During the period I kept them, the Young lady in the office, I believe Miss Stroatman, assisted in writing up the stock ledger and the stock journal and the writing up of the stock certificates, under my direction. I checked them up to see from time to time that it

(Testimony of Louis R. Jacobson.)

was being done in accordance with the way I wanted to have it done. (Examining book) These are the general journals, of the [144] Consolidated Mines of California, containing in the front part of the record the payroll sheets covering the employees at the mine proper, a record of the cash receipts, a record of the cash disbursements, and the journal.

Starting with the payroll of January 1936 and up to and including July of 1936 the payrolls were made up at the Los Angeles office; and then commencing with August 1st, with the month of August, the payrolls were prepared at the mine and copies sent to Los Angeles. And then I have then inserted in the book here following the other payroll records that have been kept in the Los Angeles office. I have examined this book in the last few days, and found my handwriting through a great portion of it. I see some entries as late as August of 1937, although I stated before that I left the early part of August; so I must have been here as late as this period. August 16th, the last entry I have in this book, 1937. I did some part work there. Mr. Shaw requested me, after they had their own bookkeeper, to come out to the office and assist in different matters. When I left their employ, their offices were in the Bay Cities Building at Santa Monica. When I came to work for the concern, Miss Florence Stroatman was not there. She was there during quite a period while I was working there at the offices in the

(Testimony of Louis R. Jacobson.)

Banks-Huntley Building. She was the only full time lady secretary in the office. Three rooms were there in the offices in the Banks-Huntley Building, on the [145] 11th floor. (Stipulated that these are the books and records of the Consolidated Mines of California, kept in the due course of business under the supervision of this duly hired accountant, Mr. Jacobson.) (That stipulation covers the general ledger, stock certificate journal and the stock ledger.)

Miss Stroatman wrote up the greatest part of the stock certificate journal, under my supervision, and checked it so that I know it is true and correct. Whoever was in the office at the time when the Stock Certificate Ledger was written up, and that also applies to the stock journal, was written up under my supervision and direction. I made checks to see that it was a proper copy and so forth.

(The journal referred to was marked "Government's Exhibit No. 67 for identification.")

(General Ledger.)

(The document referred to was marked Government's Exhibit No. 68 for identification.")

(Stock Certificate Journal)

(The document referred to was marked "Government's Exhibit No. 69 for identification.")

(Testimony of Louis R. Jacobson.)

(Stock Ledger)

(The document referred to was marked "Government's Exhibit No. 70 for identification.")

In the period I was working in the offices in the Banks-Huntley Building, Mr. J. A. Hughes, who is an accountant for the Securities and Exchange Commission, visited the [146] offices. He asked permission to examine certain of the records of the Consolidated Mines of California. I think he had access to the books—Stock ledger (Exhibit 70). I believe that he worked on that book at the office.

During the time that I was working for the company there in the offices at the Banks-Huntley Building, the black book was maintained throughout that that time. I was making the entries in it, with one exception: The section pertaining to the amount of stock that was to be distributed to the various interested parties in the mine, and that was written up by someone else in the office under my supervision. It was contained in that book. When the company transferred to Santa Monica the black book was present in the offices of the company in Santa Monica in the Bay Cities Building. Then I discontinued my employment with the company. I saw the book down there in March of 1938. It was in the offices of W. J. Shaw of the Bay Cities Building. I was there when Mr. Claypool, an agent of the Income Tax Department, was there. He and I saw the

(Testimony of Louis R. Jacobson.)

book together. It was not the occasion that Mr. Hughes was down in the same building of the same offices of the same people with me and saw the book. That was a different time. I believe it was prior to the March date which I stated. When Hughes and I were there, we both saw the black book. I believe Hughes called me or we went out there together. I believe that Mr. Shaw was in his office. Mr. Hughes then saw the black [147] book. I got Mr. Shaw's permission to give him the black book. I was no longer connected with the company. I had gone down to assist Mr. Hughes in the preparation of some work. The book was produced from the same safe we had previously had up here in the Banks-Huntley Building. Mr. Hughes was there, on that occasion, for several hours. I was there also. I am of the opinion now that Mr. Hughes had previously been there and had made certain transcripts of that black book on his own hook. At a later date or at the date which I am stating here, he requested that I come up and assist him in checking back some of his figures. So the schedules that he has were not prepared in my presence. I didn't check that book as to determine whether the other accounts which I had previously mentioned were still within that book, but from the size and contents and the size of that book I will say that the book was complete. I did glance through it casually, I will say, and saw within that book the accounts of W. J. Shaw in

(Testimony of Louis R. Jacobson.)

addition to the Tyler account, and whether or not the records of the list of the old stockholders were in there, I can't say at the present moment, but I do know that W. J. Shaw's cash account and W. J. Shaw & Company's accounts were within that book at that time.

While I was working up in the offices in Los Angeles in the Banks-Huntly Building and was making records and entries in this black book, the receipts of moneys that were [148] received from the sale of Monolith and Midwest stock were recorded in that book, in the account of Frank S. Tyler. If any sales were made for cash and not for an exchange of stock of Consolidated for Monolith or Midwest, those recepits were reflected in the Frank S. Tyler account. The money received from Miss Pew was recorded in the account of W. J. Shaw, so I would have to correct my former answer to that extent; but my recollection is that it was later transferred over to the Tyler account.

PARIS B. CLAYPOOL,

a witness for the Government, testified as follows:

Direct Examination

My occupation is Internal Revenue Agent, in the Internal Revenue Collectors Office at Los Angeles. I was so engaged in the year 1938. I have been so engaged since 1919. In this area since 1930. In 1938 I

(Testimony of Paris B. Claypool.)

visited the offices of W. J. Shaw and other persons in Santa Monica in the Bay Cities Building. It was late in August of 1938 and during the month of September of 1938. I was there numerous times. On the first occasion when I went down there, I saw a bookkeeper. Mr. Goeing is the name. I did not see Mr. Jacobson on my first visit. On my first visit I was not shown any of the books or records, any of the books or records of the Consolidated Mines of California, nor any of the books or records of Mr. Shaw. I made arrangements with Mr. Shaw, and fixed a date for a future appointment. When [149] I returned to keep that appointment Mr. Goeing and Mr. Tyler were there. Mr. Shaw was there part of the time.

The first records that were made available was the black memorandum book, looseleaf book, about 8x10½ inches in size. It contained a number of accounts, and also saw cancelled checks of W. J. Shaw & Company and Jumbo Consolidated Mines, and the Consolidated Mines, I believe the name of the company is, and cancelled checks of Shaw and of Mrs. Shaw. There was in that book an account, a Jacobson special account. There was in it the Tyler account. There was in it W. J. Shaw & Company. And there were individual accounts of Shaw and of Mrs. Edna Shaw. There may have been another account. I examined that book in some detail over a period of days. I made notations in my work papers

(Testimony of Paris B. Claypool.)

of various entries in the various accounts in the books, particularly with reference to the bank accounts of Shaw & Company and of the mining company and of the individuals in the Tyler account.

There was an account in that book that gave a listing of the proceeds received from the sale of Midwest and Monolith stock which had been received from former stockholders of those companies in exchange for Tyler partnership interests or Consolidated Mines interests. I do not recall the terminology of that particular account. Proceeding with my investigation, I was supplied with information from Mr. Jacobson in the way of working sheets or papers to [150] supplement my investigation.

Mr. Norcop: There are a total of 18 of the accounting sheets on the yellow paper, some of them 8x11½ and some of larger size, and at the very back there is another document that I think you had better see. I haven't examined it very closely. (Passing document to Mr. Montgomery.

By the Witness: He loaned me other papers but these are all that I have. I returned the other papers to him.

(The document referred to was marked "Government's Exhibit No. 71 for identification.")

(By the Witness.)

I never had possession of the black book outside of the office. That was all returned to either Mr.

(Testimony of Paris B. Claypool.)

Tyler or Mr. Goeing, who happened to be in the office at that time.

Mr. Jacobson was present on one occasion during the times I was down there at the offices in Santa Monica inspecting this book and other records. Mr. Shaw was not present.

LOUIS R. JACOBSON

resumed the stand and further testified as follows:

Direct Examination (Continued)

The transaction with Mrs. Pew was not reflected in the Frank S. Tyler account in the black book. A transaction of Mrs. Laura I. P. Franklin was not reflected in the Frank S. Tyler account. With respect to a transaction of a gentleman by the name of Smith—the property that was received was not recorded in the black book, so far as any cash transaction. It was shown in the black book for the consideration received in the back part of the book. [151] But not in the Frank S. Tyler account.

I testified this morning that it was my recollection that I saw Claypool down there in March 1938. If Mr. Claypool has his records showing it was in September, I will state it was in September of '38. (Examining document.) My recollection of this top schedule is that Mr. Hughes presented it to me at Santa Monica in his meeting there with me and

(Testimony of Louis R. Jacobson.)

certain questions arose as to the propriety of having it in either one column of the other, and that is the only reason I state that I definitely remember this sheet, because of that particular discussion. Now, as to the figures themselves, they were prepared by Hughes. I can't say whether, unless we can tie them in some other record, I can't at this moment say they were the exact figures. I don't question that they were properly prepared from that black book. I didn't prepare them. The sheet I have just been referring to is headed "1934,"—it has the total receipts of Frank S. Tyler. As to this second sheet—I have seen the makeup of those sheets similar to the ones that I saw. I know that I saw them at the Santa Monica office, on that same visit that I referred to in regard to that Tyler sheet for 1934, when Mr. Hughes was down examining the black book. That sheet is headed "Frank S. Tyler Summary of Cash Receipts Showing "Source From Which Received." And it has 1935, 1936 and 1937. As to the third sheet—we had that sheet at the time. It represents the [152] cash disbursements of Frank S. Tyler's account at the California Bank for the years '34, '35, '36 and '37, all of which was prepared by Mr. Hughes.

(The documents referred to were marked "Government's Exhibit No. 72 for identification.")

(Testimony of Louis R. Jacobson.)

(Examining sheets) These sheets are in my handwriting. The first one covers 1934. That sheet was compiled from the Frank S. Tyler account in the black book. It was prior to the time of my leaving. Those are just work sheets, more in the nature of cash receipts and disbursements for the year 1934 of the Frank S. Tyler account. The second sheet is in my handwriting, and it is headed "1935". This sheet reflects the cash receipts and disbursements of Frank S. Tyler for the year 1935 starting off with the balance of the beginning of the year and ending with the balance in the bank at the end of the year. That information was compiled from the black book.

Voir Dire Examination

There were other places than the black book from which I compiled information as to the receipts and disbursements during these years. That is not reflected in these sheets. These sheets are incomplete; in fact it only shows the Frank S. Tyler account.

(Objection Overruled.)

(The documents referred to were received in evidence and marked "Government's Exhibit No. 73.") [153]

Direct Examination (Continued)

As to the receipts entering the Frank S. Tyler account or entering the W. J. Shaw account—there wasn't any great distinction as between the two accounts insofar as the disbursements were con-

(Testimony of Louis R. Jacobson.)

cerned, but insofar as receipts of the Tyler agreement and on the subsequent sale of the Consolidated stock of Tyler's stock, with the exception of the Pew sale for $30,000, the sale to her of Consolidated stock, I attempted to keep all such receipts in the Tyler account. That account was in the beginning at the head office of the California Bank. Frank S. Tyler and W. J. Shaw could sign checks on that account. I think the checks would show that Tyler signed most of them. I might say that the way Shaw did sign them would be "Frank S. Tyler by W. J. Shaw."

In that Tyler account were deposited the proceeds received from the disposition of Monolith and Midwest shares, in particular, the proceeds that came from the disposition of Monolith and Midwest shares that had been brought in from the shareholders who later acquired interests and exchanges therefor in the Tyler agreement and Consolidated Mines. The brokerage houses that handled the disposition and sale of those Monolith and Midwest shares for the organization were Pledger & Co. and Fastnow. That was where most of the Midwest and Monolith was sold. Those trading accounts were carried over at Pledger & Company in the name of Frank S. Tyler. An account was carried in my name there [154] for a short period of time, and also in the name of Florence Stroatman. She was the lady secretary in the office. The accounts were

(Testimony of Louis R. Jacobson.)

opened in that fashion with Pledger & Company under the direction of W. J. Shaw. When sales of Monolith and Midwest stock were made in my account, with the Pledger & Company and I receive a check or other evidence of the proceeds back in my name, I endorsed them and deposited them in the account of Frank S. Tyler, to the best of my knowledge. The Florence S. Stroatman checks that were proceeds from the same source, Pledger & Company, were handled after they were received by her. I presume, with respect to Frank S. Tyler, they were deposited to the account of Frank S. Tyler. If we needed money we would go up there and generally get a check for either the round amount of stock that had been sent over to them or take over a block of stock to the broker and we would get a check from him to cover those sales made by the broker. "We" includes Tyler or Miss Stroatman and myself. At most instances I would do it under the direction of W. J. Shaw. The other times as we required money, Frank S. Tyler and I would discuss it and we would take, he or I or Miss Stroatman would take, this stock up there as we required money. The certificates of stock were always available in the vault and the market was made for those sales. The other broker was Fastnow. I think in the Fastnow there was only one account, in the name of Frank S. Tyler. As to this first batch of [155] sheets which were marked for identification Exhibit 72,—whether I agreed

(Testimony of Louis R. Jacobson.)

or disagreed with Mr. Hughes' headings or allocations for these subdivisions on the various sheets. I can't answer as to this first sheet for '34, but I will say that the sheets for '35, particularly disbursements, this is the manner in which I kept the breakdown for month by month in that black book. I had these headings in the black book that are reflected at the top. It would appear that that would be about the manner in which I would distribute those accounts for the individual months, more in the nature of a summary for the total receipts as shown by the individual days during that month. I discussed those subjects with Mr. Hughes when he was compiling those accounting sheets. I didn't stay with him continuously while he was working, but he asked me certain questions from time to time, and it is only to that extent.

Mrs. Pew's transactions were reflected in W. J. Shaw's account. It may have been in W. J. Shaw or W. J. Shaw & Company, although my recollection is that it was W. J. Shaw.

I received compensation while I was working there from late October '34 to the time I left in '37. W. J. Shaw and the committee paid my compensation.

When I severed my connection with Mr. Shaw and the Consolidated Mines, they removed their offices to Santa Monica. All of the cancelled checks and all of these accounts thereafter, month by month, were put into the safe. [156] A considerable number of the checks were placed—the old checks

(Testimony of Louis R. Jacobson.)

were taken out of the safe and put on the shelves in the room there, on these little cabinets. They were wooden cabinets, that is, they were built-in affairs in these various offices in the Banks-Huntley Building. When they removed all the checks and fixtures and so on from the office, those checks were put into boxes. What became of them or whether they went into the safe or where they were put after they went to Santa Monica, I have no knowledge. I did go down there after the move and work there for a short time. I might say from the time Mr. Shaw moved his office to Santa Monica, it was my intent then to move in Los Angeles proper and carry on practice, and he told me I could use that room which I was in, and as long as the rent had been paid for, and my clients then would continue there, and open my own offices. It was just about two or three weeks subsequently that he asked me to come out there and assist him there. I didn't see any cancelled checks either on my first visit out there after the move or later. Whether they were put into the safe or kept in boxes, they all had been reconciled, and there was no further need of examining those checks as far as I was concerned. Immediately after they moved to Santa Monica I believe Mr. Shaw obtained the young man there to take care of the books.

I was not a stockholder in the Consolidated Mines of California. I was not an officer or a director.

[157]

(Testimony of Louis R. Jacobson.)

I don't know of my own knowledge of any stockholders' meetings of the Consolidated Mines of California that have been held. [157a]

Receipts from sales of Midwest stock or Monolith stock were continuously deposited to the Frank S. Tyler account. That was the principal source of revenue for the Frank S. Tyler account. I received directions while I was employed from October, 1934 to the time I left in 1937, in the main, from Mr. Shaw. The signature or authorization requisite to release Monolith or Midwest stock from the depository of the Pacific National Bank in San Francisco was that of Mr. Shaw. During the entire time that I was there, it is a fact that even if a stockholder of Monolith and Midwest sent into the Pacific Bank there their depository receipt with instructions to send them their stock, that they couldn't obtain it without Mr. Shaw's signature.

Mr. Alexander was the salesman who went out to solicit the Monolith-Midwest stockholders on the Tyler agreement. I think there was one other whose name I don't recollect, but he made very few deals. I don't know whether Milt Alexander solicited the Midwest stockholders directly on the Tyler agreement. When the Tyler agreement was succeeded by the Consolidated Mines of California, Charley Wohlberg at that time was soliciting the certificate holders, and Mr. Tyler was out with Charley Wohlberg making those solicitations.

The Tyler agreement had practically been con-

(Testimony of Louis R. Jacobson.)

summated almost in its entirety before I came into the picture in October of 1934 with very few exceptions, so I can't say [158] who the other solicitors were with respect to that Tyler agreement.

I sent Mr. Alexander checks from time to time on the committee account. That was when they started the Midwest suit and he was bringing new members or reviving the committee. My recollection is that he did get some compensation from Frank S. Tyler in addition to that of the committee, and that compensation from Frank S. Tyler would be on any possible deals that he might consummate. That would be reflected in the Frank S. Tyler account. To the best of my knowledge, Morgan did not go out soliciting, although I knew he had made contacts with a number of them. I never had any discussions with Mr. Shaw as to why he was not an officer or director of the Consolidated Mines of California, nor did he volunteer any statement to me on that subject. As to any cash disbursements made on the mine, McKisson Mine, and the other prospects up there, which are not reflected in the Frank S. Tyler account in the black book or the corporation books of the Consolidated Mines—I know of a certain memorandum exists that shows the disbursement for account of the mine to the extent of about $7,000. That has not been recorded either in the Frank S. Tyler account or that of the Consolidated Mines. That was '35 and '36; maybe altogether in '36. This memorandum, I believe, is in the pos-

(Testimony of Louis R. Jacobson.)

session of Mr. Hughes, and I happen to have a copy of it in my file. It was moneys that W. J. [159] Shaw had personally advanced to the Consolidated Mines or for the account of the Consolidated Mines. There is in the books of the Consolidated Mines of California an entry showing the valuation placed upon the mines, under account of Mine Property. Account No. 9. "Mine Property, Account No. 9." Under date of February 1936, journal page 1, a charge, which is a debit, $355,000. That is in my handwriting. Before I made that entry, I discussed that with Sam Chaney, Reed Sampson, Tyler, Morgan, and I believe I also discussed the matter with Mr. Shaw. That figure was covering all of the properties; that is, the Porteous group as well as the Lytle group. There is an entry in the books when they were opened for the corporation, that is, the Consolidated Mines of California, showing indebtedness against these mining properties on account of their unpaid purchase price, under Account No. 31 headed "Contracts Payable." Under "Liabilities." That is in the year 1936. Starting with February. There is a credit that is set up there or a liability set up there from journal page 1, $22,000. The discussion before I made that entry of that figure of $22,000 was with Mr. Tyler and Mr. Morgan as to what you might call the propriety of setting up that liability on the books of the corporation. We discussed this matter pro and con, and after several

(Testimony of Louis R. Jacobson.)

discussions with both Morgan and Tyler, I took it up with Mr. Shaw and, at his request, we referred it to Mr. Guy Graves. [160]

Both Tyler and I went up to see Guy Graves, and the Attorney Graves stated that, in his opinion, it was a liability of the corporation, or should become a liability of the corporation in the transfer of property from Tyler to the Consolidated Mines.

It wasn't a matter or a statement to the attorney of an accounting matter at all. I told him the interpretation of that contract. Referring to the Tyler partnership agreement: I was of the opinion and felt that it was a Tyler obligation. I took the matter up after discussing the matter with Mr. Morgan and Tyler and they couldn't come to any definite decision. One said one thing, and the other said another. I took the matter up with Mr. Shaw and he said it was purely an interpretation of the contract and it should be decided on by Mr. Guy Graves who had written this agreement, and Tyler and I went to see Graves and Graves gave as his opinion that that $22,000 would be an obligation of the corporation, and that it was purely a legal matter and in accordance with his opinion it was set up as a liability of the corporation. My own viewpoint in the matter didn't make any material difference. I had to base it entirely on Guy Graves' opinion. (Examining documents) Exhibit 71 for identification.

(Testimony of Louis R. Jacobson.)

I come across one sheet that isn't in my handwriting. That is three paragraphs of typing, and is headed "July 1, 1935." They might have been separate sheets at the time. Either he or I might have [161] pinned them together. This typewritten sheet was a part of the loose papers and they might have all been pinned together at that time. These two shouldn't be in that file.

You hand me now two sheets on paper in my handwriting, but they were prepared a few days ago in your office, compiling the income tax returns. And this is typed. As to when this carbon statement was handed to Mr. Claypool—I believe these are the sheets that he had when he was checking the income tax return at the Santa Monica office. I prepared it from the black book. With respect to the first sheet of this exhibit headed "McKisson Mines—Frank S. Tyler Agreement,"—I prepared that sheet from the black book and I used the black book as the basis of preparation of this white sheet. I do not know of any other record that I made use of in connection with the preparation of it. The next sheet was prepared from the black book, taking into consideration Frank S. Tyler's account, W. J. Shaw and W. J. Shaw & Company, and it was prepared for income tax purposes, and it is headed "W. J. Shaw." And the sub-heading is "Summary of Income and Deductions for Income Tax Purposes for the Year Ended December 31, 1936." I won't make any answer as to whether this next

(Testimony of Louis R. Jacobson.)

sheet was prepared from the black book or not. It is a memorandum of some sort and served no purpose whatsoever. I might have started compiling it and dropped it because it doesn't mean anything to me. This next sheet is a summary of certain income received by [162] W. J. Shaw from Mrs. Pew, and also from the settlement on the Monolith suit. There is an item here for $13,500, "Said consideration received from"—and didn't finish it. It is more in the nature of a memorandum that I compiled for some purpose, but it was compiled from the black book, and the heading is "Funds Received from"—"Nellie Pew," but it should have been amplified, because I had other funds in addition to that. This next sheet is a memorandum that certain distribution of expenditures which were made by me out of the L. R. Jacobson trustee account, and taken from the black book. The summary of receipts and disbursements account was contained in the black book.

The next sheet is headed "W. J. Shaw-Security Bank." The break down of the memorandum here doesn't mean much so far as—it might have been of some purpose at the time it was prepared, and represents the break-down of disbursements out of the W. J. Shaw-Security Account. It has no date on it. That was prepared from the black book as well.

This sheet you are showing me is headed "W. J. Shaw-Security Bank." This is a break-down of W. J. Shaw account in the Security Bank of disbursements, and it isn't dated. It is poor practice, I know,

(Testimony of Louis R. Jacobson.)

not to date these, but, at any rate, it wasn't done. That was taken out of the black book.

The next sheet is headed "W. J. Shaw & Company-California Bank, 1936."

It is a schedule of the break-down of the disbursements [163] of W. J. Shaw & Company account, California Bank, for the year 1936 and was prepared from the black book.

The next one is Frank S. Tyler, and is headed 1936.

As to the next sheeet Lewis R. Jacobson trustee account, October 16, 1936, to December 31, 1936. There is another sheet that should be with it. There were two sheets there. This is carried on from December 31, 1936, to the time when the account was closed. This account was opened, you see, in October 16, 1936, to December 31, 1936, and an account carried in my name as trustee at the Bank of America at Seventh and Spring and represents the disbursements made from that account. The other sheets had the receipts. I think it was a short sheet I had. I saw it the other day. Well, it is a continuation of this sheet for the remaining period, but the record of these disbursements was carried in the black book. I would say they came out of the black book, all these memorandums. I don't know what it is. As to this one—The Security Bank—that is also taken out of the black book. These are little scraps of papers that I don't know where they came from. Here is an attempt on my part to sum-

(Testimony of Louis R. Jacobson.)

marize the receipts of the Jacobson account, Tyler and W. J. Shaw account for a period, but, as I say, those were memorandums. The next three sheets are blanks.

This sheet headed "Sources of Income," doesn't seem to have any connection, although the information there would have been prepared from the black book. I prepared this [164] typewritten schedule from the black book. (Examining document). This typewritten statement dated Monday, July 1, 1935, is a memorandum.

Since my trip to Santa Monica, which Mr. Claypool fixed as being in late August and early September of 1938, I have had discussion with Mr. Shaw relative to the black book. In the case of civil action that was carried on between Morgan and Shaw I did ask about that black book. I believe it was the latter part of '39 when I was discussing that with Mr. Shaw. His attorney was present. I just asked him whether he had the black book with him, as I desired to get some information therefrom in respect to that L. R. Jacobson trustee account which was involved in this action. His reply was that he didn't know where that black book was. W. J. Shaw paid the rent for the offices in the Banks-Huntley Building. With reference to the Bay Cities Building in Santa Monica—I don't know. All of the ventures that were represented by accounts in the black book were conducted from the offices in the Banks-Huntley Building. I have made a sum-

(Testimony of Louis R. Jacobson.)

mary from these books of the total receipts from the sale of stock of the Consolidated Mines of California. It is these two here (indicating). These are Exhibit No. 73. I prepared those. These receipts themselves would be represented by the liquidation of the various other securities that would have been received from both—on the original partnership agreement and then the subsequent sale by Frank S. Tyler of [165] his personally owned stock.

In 1934 from the Monolith stock which had been received by Frank S. Tyler on the partnership agreement there was obtained the sum of $41,822.69, and the cash that was turned in by the members of the partnership on the Tyler agreement amounted to $5,237.

The other items represent the sundry receipts of $998.78. The total for that year would be the addition of those three figures—$47,059.69, for the year 1934. In 1935, consideration received from the sale of securities, which securities were received by Tyler on the sale of his personally owned stock, was the sum of $64,971.10.

The next item in the amount of $499, marked "Dividends," represents the dividends that were accrued on the Monolith preferred stock up to the time they were sold.

Then there is an item of $958.71 which is represented by ore sales of the Consolidated Mines. That was a test run they had in '35, which amount, however, was subsequently transferred to the books of

(Testimony of Louis R. Jacobson.)

the Consolidated Mines, the corporation, and Tyler was charged with that amount.

Then there are some miscellaneous receipts of $5,270.88 which would not be any part of the mine deals.

Then there is $1175 received by Tyler on the Monolith Committee and, as I recollect, this amount would be reimbursed to him for certain expenditures that he had made for the benefit of the Monolith Committee, and the disbursement on [166] this sheet would indicate that Tyler was advancing certain sums for the benefit of the committee.

Then there is an amount of $33,351.74 that he received from W. J. Shaw.

Then in addition to the $64,971.10 received by Frank S. Tyler on the sale of securities which he had obtained on the Consolidated Mines stock, there was a sum of $10,797.72 which came in as cash representing purchases of the Consolidated Mines stock. That gives a final total of receipts for the year of $117,024.15.

Then there is an item directly under that, the balance at January 1, 1935, of $2,363.28, giving a grand total of receipts, and the balance carried forward at the beginning of the year, of $119,387.43. On this same exhibit, starting with 1934, the amount advanced to the Consolidated Mines $14,528.42; office expenses $2,778.27; amount transferred to W. J. Shaw, $75,576.53.

(Testimony of Louis R. Jacobson.)

Under receipts for 1934 there is an amount of $68,415 which Mr. Shaw turned over to Frank S. Tyler and represents his private deals on the sale of Monolith stock in the amount of $30,015 and various loans that he had made which he subsequently repaid in the amount of $38,400, which totals $68,415, against which Tyler returned to him $75,576.53.

Under disbursements for 1934, there is an item of Frank S. Tyler and office $4,660.09; purchase of stock, $7,681.50; salesmen's commissions $2,155.91; Monolith committee $494.03; [167] and under the caption "Sundries" $5,276.32; contra items $858; miscellaneous $110.22; totaling $6,235.54; making a grand total of disbursements for the year 1934 of $114,110.29, leaving a balance as of December 31, 1934, of $2,263.18.

For 1935 amount advanced to mine, $24,069.36; Frank S. Tyler, $16,600.51; W. J. Shaw, $47,709.84; office expenses, $5,998.85; purchase of stock, $7,875.91; advance to Monolith committee, $3,830.30; C. C. Shockley deal, $6,107; under "Sundry-notes paid," $4,986; interest $140.82; contra, items, $1,373.50; miscellaneous $195; total $6,695.32, making total disbursements for 1935 of $118,887.09; leaving a balance in bank of the December 31, 1935, of $500.34.

I did not prepare any similar schedule to this for the year 1936. In the previous year when I came to these two items of Shaw and Receipts and

(Testimony of Louis R. Jacobson.)

Shaw and Disbursements, I made an estimation. I did not make the same explanation with respect to 1935. It is a different set up. In other words, the withdrawings here would be out of these receipts from various other sources. No detailed reports of receipts and disbursements were sent to the stockholders of Consolidated Mines of California while I was there. I have an item of receipts of the 1935 year of $10,797.72.

6,777 shares of Monolith preferred stock and 4,768 shares of Monolith common were received under the Tyler agreement in 1934, and cash or securities other than the Monolith which [168] were converted into cash amounting to $10,595, or a total consideration received of $63,147.

With respect to 1935—Monolith Portland and Midwest Company stock, 28,881 shares, Monolith Portland Cement Company common, 407 shares; Monolith Portland Cement Company preferred, 1627 shares. Cash received from sundry investors, $10,-790.72. And then giving the values that I have extended for these stocks, the Midwest was $41,877.45, and the Monolith common was $1,017.50, and the Monolith Portland Cement preferred was $10,574.50.

And, adding those three together with the sundry or the cash received from sundry sources, makes a grand total of $64,260.17, and this consideration, of course, was received from the sales of Mr. Tyler's personally owned stock and had nothing to do with the original partnership agreement for '34.

(Testimony of Louis R. Jacobson.)

(After considerable discussion by the court which is omitted.)

By the Court: Gentlemen, we have all sorts of ways of raising legal questions before the case is concluded. I just want to make it clear in the jury's mind—I haven't said anything to them because I have been busy with other things; however, I do hear what is going on. I can sit back and do other work and listen too. I have surprised lawyers sometimes with it. But I want to make clear this proposition that the Government may go in certain respects to the determinations of the Corporation Commissioner as to the nature of the enterprise. After all, the blue sky law says—it doesn't guarantee anything—it says it isn't a fraudulent [169] scheme. It doesn't endorse it. In fact, they print at the top, "This is not an endorsement of the stock" in red so people can read it. The Government can go behind that because the mere obtaining of a permit doesn't mean anything. They can use it to show it was a cloak for fraud, but where the permit authorizes the giving of stock in consideration for something, the Government cannot go behind and say that is too much money. It is a matter of law which I will give you later, the amount of stock Mr. Tyler was given by the corporation. There is no restriction as to who he could sell it to. He may have violated the federal law by selling in interstate commerce, but the Government can't inquire why he sold it, how much he sold it for, and what

(Testimony of Louis R. Jacobson.)

he did with the money. He might have been shooting craps for all we know. The Corporation Commissioner decided he could do that. If it was a fraud on the stockholders to take that much money for the exchange, the Government has to show that representations were made that he wasn't getting anything for it. There is no charge made here that Tyler in any way represented or agreed that he would turn over these claims which he got for nothing . . . If you use the mails, it doesn't have to go from one state to another; using the mails, you see, using the mail whether it is interstate or not. You can be guilty of violating the law if you send it through the mail, even though you send it into the state . . . I don't think it says interstate commerce; it just says using the mail for the sale. I think [170] the indictment, or rather the three counts are drawn on subdivision 5 . . . It says, "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly——

"(1) To make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

"(2) To carry or cause to be carried through the mails or in interstate commerce—" "or". That means either way. That means you can't transport it. You can't send it through express companies.

(Testimony of Louis R. Jacobson.)

"By any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Then follows the registration clause.

Mr. Montgomery: Then it gives the exemptions. You didn't read that portion.

The Court: Well, we will read the rest of it later on. [171]

LOUIS R. JACOBSON

further testified as follows:

Direct Examination (Cont'd.)

As to what accounts in the black book reflect expenditures on behalf of the McKisson Mine, the account of Edna F. Shaw in the early days of 1934, and there were expenditures out of the W. J. Shaw account and the W. J. Shaw & Company account. To what extent in those latter accounts, I don't know, and the Tyler account as well. I did discuss that when stock was received in the office, this Monolith or Midwest, that it was sold to brokers and the proceeds deposited, but I don't say that all the stock was sold to brokers. Some was sold in some other way. The brokers I have mentioned are Pledger & Company and Fastnow. Proceeds received from these brokers and other sources, after disposition of the stocks, were deposited, practically in all instances in the Frank S. Tyler account. The practice was to deposit them all in the Frank S.

(Testimony of Louis R. Jacobson.)

Tyler account. From the time I came until the company left to go to Santa Monica I was in the offices in the Banks-Huntley Building the greatest part of the time. I saw Alexander and Tyler and Wohlberg in the offices, and other persons that we might call salesmen. I saw Mr. Shaw confer with Mr. Alexander in the offices. That was infrequently. Alexander was on the road the greatest part of the time. When Mr. Alexander would return from a road trip, he would have conversations with Mr. Shaw. That was true of Mr. Wohlberg [172] and Mr. Tyler. A group of three rooms was the suite there in the Banks-Huntley Building. The front room was the entrance and the room to the left was Mr. Shaw's room, and the room to the right is the room which Mr. Tyler had our desks in. Mr. Morgan would take any desk that was available to him, either in the outer office, the center office, or in the office to the right. During the interval, if I were in those offices in the Banks-Huntley Building, I saw those individuals, Mr. Alexander, Mr. Wohlberg, I think a Mr. Nockels, go into Mr. Shaw's office, individually. That occurred more than once. When they were there and Shaw was in the office, I would say they would confer if they had any business to transact. When matters of policy were finally determined in respect to the sales activities of the partnership agreement those discussions would be had between W. J. Shaw and Frank S. Tyler. With respect to the sale of Consolidated Mines of Cali-

(Testimony of Louis R. Jacobson.)

fornia stock, they would have conferences between Tyler and Morgan and the salesmen. They would discuss matters quite generally as between Morgan, for instance, and Tyler would also discuss matters with him. There was never any one particular person. They discussed the matters with Mr. Shaw. When Alexander and Tyler were on the road and stock was sent in by them, if it came in the mail the stenographer, Miss Shroatman, or whoever was in the office, would hand it over to Mr. Tyler or me. I don't believe any of it was handed over to Mr. Shaw. Mrs. Shaw [173] never paid much attention to that. On one or two occasions Mr. Wikoff personally brought in some stuff. As they required funds, they would be sent over to the brokers. Those accounts at Pledger and Fastnow were carried in the name of Frank S. Tyler, Florence Stroatman and myself. At times I had some discussion with Mr. Shaw before I took stock over for liquidation to the brokers. In my capacity as accountant and bookkeeper and in keeping from day to day the records, and particularly the black book, I did not make any hard-and-fast distinction between the Frank S. Tyler and the W. J. Shaw account.

Some of the stockholders of the Consolidated Mines visited the offices from time to time. In several instances I recollect that they talked to Mr. Shaw, but very few, indeed, though, who did discuss matters with him.

(Testimony of Louis R. Jacobson.)

I am referring now to the journal of the Consolidated Mines, under the heading of February, 1936, Account No. 1, $355,000, and the statement is "Mines Property," or "Mine Property." It is not an account number. That is just a check number. It is "Mine Property, $355,000." That entry is all of the properties. That would include the Grand Prize and those other Porteous properties. It is an estimate of the value. I had discussed it with Mr. Shaw before that entry was made, in conjunction with Mr. Tyler, Mr. Morgan, Reed Sampson and Sam Chaney. There is an entry in the same book showing something about the cost of the mill. On page 1 of [174] the journal, under date of February 1936, I find there $6500, described Mill and equipment. The other day I was testifying about an item of $22,000 which represented the unpaid purchase price of mining property. That included 14,000 on the Porteus properties and 8,000 on the McKisson.

I did not make any profit and loss statements for the Tyler partnership at any time prior to January, 1936. I make a profit and loss statement for the Consolidated Mines of California, only as of December 31, 1936, in connection with income tax returns.

Mr. Tyler requested the information as to the progress of the mine; Mr. Shaw also, from time to time, asked me how the mine, as far as the record shows, just what the results were. Mr. Morgan as

(Testimony of Louis R. Jacobson.)

well was very much interested in knowing how things were going along at the property. Mr. Shaw was not a stockholder in the Consolidated Mines of California and Mr. Morgan was not a stockholder in the Consolidated Mines of California.

I don't recollect what the status of the bank accounts was after October or November of 1936. I prepared or assisted in preparing W. J. Shaw's income tax reports for 1934 and 1935, and 1936. When I was making up the income tax return for the year 1934 for Mr. Shaw—and if I made one for Mr. Tyler—I did not take into consideration any formal agreement which had been explained to me by Mr. Shaw or Mr. Tyler as between those two gentlemen. For 1935 that agreement was [175] taken into consideration. My recollection is that Frank S. Tyler signed it. I have no recollection as to W. J. Shaw signing it. That document was kept in the vault. The last time I saw it was some time in the latter part of '35 or the early part of '36. I don't remember if I made use of it in 1936 as a factor in determining the income that belonged to Mr. Shaw and what belonged to Mr. Tyler.

(Examining document.) No share of the partnership, the Tyler partnership agreement, or rather no share of the proceeds from the partnership agreement, is shown on W. J. Shaw's return for the year 1934. That return was notarized before me.

(Testimony of Louis R. Jacobson.)

(Examining document.) That is a direct copy of the agreement. That was signed by Mr. Tyler alone. My recollection serves me very clearly on that.

(The document referred to was received in evidence and marked "GOVERNMENT'S EXHIBIT No. 74.")

It was put into the vault. Others had access to the safe as well as myself. I had made use of it in connection with making income tax returns for the two gentlemen whose names are mentioned in there.

Mr. Norcop: "Monday, July 1, 1935.

"For and in consideration of the assistance rendered to me by W. J. Shaw in the formation of that certain mining partnership entered into between myself and sundry other individuals under date of February 6, 1934, and for certain [176] cash advances made to me and for other considerations received, I hereby assign to W. J. Shaw, an eighty per cent (80%) interest in any and all net income to be realized from the consideration received by me out of said partnership agreement, and from the net proceeds that may be realized from the sale of the capital stock I am to receive as my forty per cent (40%) interest in the corporation formed, namely, the Consolidated Mines of California, when such stock shall have been issued to me

(Testimony of Louis R. Jacobson.)

as and when authorized by the Corporation Department of California.

"It is understood that under the above mentioned partnership agreement I have incurred certain expenditures in the development of the mine properties, the amount now being in excess of $35,000.00; and that I have still to expend additional sums before I shall have fulfilled my part of the agreement; all of which is in accordance with said partnership agreement. The amount to be expended is, at the present time, underminable, and will be based on the Engineer's reports etc. The net profits are, therefore, to be arrived at only after all the terms of the partnership agreement have been fully performed.

"It is understood that the stock of the Consolidated Mines of California, to be issued to me, is to stand on the books of that Company, in my name, but I will, on demand, authorize the transfer of said stock to W. J. Shaw or his nominees." [177]

(Testimony of Louis R. Jacobson.)

The record should show that while the document isn't signed, this being a carbon copy, it is understood and stipulated the only signature was Frank S. Tyler.

(By the Witness)

I made out the income tax return for W. J. Shaw for the year 1935. I presume this is a correct copy. It is a photostatic copy thereof. In making up this income tax return, I made use of the last Exhibit No. 74, the assignment of 80 per cent by Tyler to Shaw, dated July 1, 1935. As to whether there is any income reflected there as coming from the Tyler partnership agreement—there is none. There is income reflected as coming from the Consolidated Mines of California. (There was offered in evidence Exhibit 37, being the income tax return for W. J. Shaw for 1935.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 37.")

(Testimony of Louis R. Jacobson.)

GOVERNMENT EXHIBIT NO. 37

"INDIVIDUAL INCOME TAX RETURN

* * * * * * * *

For Calendar Year 1935

* * * * * * * *

W. J. SHAW
634 South Spring Street
Los Angeles, Los Angeles, California

* * * * * * * *

Item			
8.	Capital Gain (or Loss). (From Schedule C) $65,067.25—16,200.00	52,867.25	
*	* * * * * * *		
10.	Dividend on stock of (a) Domestic Corporations subject to taxation under Title I of 1934 Act.....	340.25	
*	* * * * * * *		
12.	Total Income in Items 1 to 11.....		53,207.50
13.	Interest Paid (Explain in Schedule F).....	646.82	
14.	Taxes Paid (Explain in Schedule F).....	602.78	
15.	Losses by fire, storm, etc..... (Explain in Table at foot of page 2)	3,000.00	
*	* * * * * * *		
18.	Other Deductions authorized by law (Including stock determined to be worthless during taxable year).....	25,978.95	
19.	Total Deductions in Items 13 to 18.....		30,228.55
20.	Net Income (Item 12 minus Item 19).....		22,978.95"

* * * * * * * *

(Testimony of Louis R. Jacobson.)

(An exhibit attached to this Income Tax Return reads in words and figures as follows):

"TO BE ATTACHED TO INCOME TAX RETURN FOR CALENDAR YEAR Jan. 1, 1935 to January 1, 1936 for W. J. SHAW.

Consideration Received from sale of 44,930 shares of Consolidated Mine Co. stock		
28,881 Shrs. Monolith Portland Midwest Co. Prfd at $1.45		$41,877.45
1,627 Shrs. Monolith Portland Cement Co. Prfd at 6.50		10,575.50
407 Shrs. Monolith Portland Cement Co. Common at 3.00		1,221.00
Cash and/or Cash Realization from Sundry securities		10,189.00
		$63,862.95
Sundry Profits from Securities		
1122 Shrs. Monolith Portland Midwest Co. stock Purchased		
Selling Price $1,626.90		
Cost 1,422.60	$204.30	
Sundry Profits on Sales	1,000.00	
		$65,067.25
Cash realized from sale of part interest in mining partnership		4,000.00
Less: Commissions and share of profits paid to others		16,200.00
Net Capital Gain		$52,867.25"

(Witness Reading)

"Consideration received from sale of 44,930 shares of Consolidated Mines Company stock:

"28,881 shares Monolith Portland Midwest Company preferred, $1.45, $41,877.45.

"1,627 shares Monolith Portland Cement Company preferred, $6.50, $10,575.50.

(Testimony of Louis R. Jacobson.)

"407 Shares Monolith Portland Cement Company common, $3.00, $1,221."

Q. And the next item? [178]

A. "Cash and/or cash realization from sundry securities, $10,189.

"Total, $63,862.95."

The item, second from the last, has no connection with the Tyler partnership or the Consolidated Mines.

I cannot tell from examining this income tax return for 1936 for Mr. Shaw whether there is any income there the source of which is the Tyler partnership agreement. I cannot tell from examining this return alone whether or not there is any income reflected there for Mr. Shaw from the Consolidated Mines of California. I would have to have my working papers to determine that. I can only go by my recollection in respect to the preparation of this return. I have a recollection as to some notation I see on the income tax return that will assist me in answering your question. For the year 1934, Frank S. Tyler, in reporting on his income tax return, did not include any part of the proceeds received from the sale of the securities and other matters which he derived from the partnership agreement.

I took the position that until he will have fulfilled all the terms of that partnership agreement, and until the corporation was ready to take over the assets and assume whatever liabilities there were of

(Testimony of Louis R. Jacobson.)

the corporation, that he was not in a position to determine whether or not he had any profits.

That continued during 1935 because he continued in [179] this partnership arrangement with his individual partners.

In the preparation of the return of 1936 there was a small slop-over, I will say, from '34 on some of the money or securities that he had received, or profits he made on the deal. I can't say how much was derived by him on that partnership agreement, but it was very small indeed. It ran only a few thousand dollars.

That is the reason I made notations in here, in this income tax for the period 1934 to 1936, to take over part of that profit. That is about the time I set up the records, about as of October 1, 1934. That is W. J. Shaw & Company. I included whatever profits there were in that deal to Frank S. Tyler and then deducted from that return the amount of 20 percent, or whatever it was. My statement is that in this return is reflected 80 percent of Mr. Tyler's income under the Tyler partnership agreement in 1934, that is, 80 percent of his 40 percent. (Examining document) In 1934 Frank S. Tyler shows receipts of $47,000; $47,059.69, to be correct. The income tax return I have prepared for Mr. Tyler for 1935 reflects income for that amount of $8,000. There was no connection between this figure of $16,000 and the income tax return. During

(Testimony of Louis R. Jacobson.)

the year 1935, at the end of the calendar year, we were taking into account in making up both Mr. Tyler's return and Mr. Shaw's return this Exhibit No. 74, the assignment, 80 percent from Tyler to Shaw, and in which we approximated the $8,000 as shown [180] on Tyler's return. The approximate amount of the profits of that. You made a statement a moment ago, that no return was filed for Frank S. Tyler for '34. I believe a return was filed for Frank S. Tyler and associates. (Examining document) It shows no income in line with my explanation which I made a little while ago. I took care of it in '36. A little hang-over, if there was any then.

(The document, income tax for 1934 of Frank S. Tyler and Associates, referred to was received in evidence and marked "Government's Exhibit No. 51.")

(Mr. Tyler's Income Tax for '35 offered.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 40.")

(Testimony of Louis R. Jacobson.)

GOVERNMENT EXHIBIT NO. 40

"INDIVIDUAL INCOME TAX RETURN

* * * * * * * *

For Calendar Year 1935

* * * * * * * *

FRANK S. TYLER
848 - 19th Street
Santa Monica, Los Angeles, California

* * * * * * * *

INCOME

Item		
1.	Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) share of Profits from Sale of Stock..... 8,000.00 from W. J. Shaw—634 South Spring Street, Los Angeles.	
*	* * * * * * *	
12.	Total Income in Items 1 to 11.....	8,000.00

DEDUCTIONS

*	* * * * * * *	
20.	Net Income (Item 12 minus Item 19).....	8,000.00"

Mr. Tyler's income return here for '36 does not necessarily show income from the Tyler agreement; it shows income from the Consolidated Mines or in accordance with that memorandum agreement which Mr. Tyler signed there giving his 20 percent interest.

(The document referred to was received in evidence and marked Government's Exhibit No. 41.")

(Testimony of Louis R. Jacobson.)

GOVERNMENT EXHIBIT NO. 41

"INDIVIDUAL INCOME TAX RETURN

* * * * * * * *

For Calendar Year 1936

* * * * * * * *

FRANK S. TYLER
848 - 19th Street
Santa Monica, Los Angeles, California

* * * * * * * *

INCOME

Item			
1.	Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) W. J. Shaw, 634 South Spring Street, Los Angeles	8,735.60	
*	* * * * * * *		
12.	Total income in Items 1 to 11		8,735.60

DEDUCTIONS

*	* * * * * * *		
20.	Net Income (Item 12 minus Item 19)		8,735.60"

(Mr. Shaw's Income tax return for 1936 offered.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 38.")

(Testimony of Louis R. Jacobson.)

GOVERNMENT EXHIBIT NO. 38

"INDIVIDUAL INCOME TAX RETURN

* * * * * * * *

For Calendar Year 1936

* * * * * * * *

W. J. SHAW

634 South Spring Street
Los Angeles, Los Angeles, California

* * * * * * * *

INCOME

Item			
1.	Salaries, Wages, Commissions, Fees, etc. (State name and address of employer) Monolith Stockholders Committee 634 South Spring Street, Los Angeles	31,000.00	
*	* * * * * * *		
10.	Capital Gain (or Loss). (From Schedule C) (If Capital Loss, this amount may not exceed $2,000.00).	69,742.05	
11.	Other Income. (State nature). (Use separate schedule, if necessary). Sundry	100.00	
12.	Total Income in Items 1 to 11		100,842.05

DEDUCTIONS

13.	Interest Paid (Explain in Schedule F) On Mortgage, Deeds of Trust	1,447.01	
14.	Taxes Paid (Explain in Schedule F) On Real Estate (City and County Taxes)	1,881.60	
*	* * * * * * *		

(Testimony of Louis R. Jacobson.)

Item		
18. Other Deductions Authorized by Law. (Including Stock determined to be worthless during Taxable Year) (Explain in Schedule F.)	60,451.75	
19. Total Deductions in Items 13 to 18		63,780.36
20. Net Income (Item 12 minus Item 19)		37,061.69

* * * * * * * *

(An exhibit attached to this Income Tax Return reads in words and figures as follows):

"W. J. SHAW
INCOME TAX FOR YEAR ENDING DECEMBER 31, 1936

Other Deductions—Line 18

Losses from Sundry Ventures entered into for profit		
Gould-Peterson Mine Venture	$ 716.82	
Oil Venture	890.00	
Single Tax Committee	430.26	$2,037.08
Sundry Expenses		
General Office Expenses	2,959.77	
Telephone	84.24	
Legal Expenses	1,000.00	
Revenue (U. S.) Stamps paid to be applied to Consolidated Mines stock certificates Income from sale therefrom reported under 'Capital Gain'—Line 10	2,400.00	
Traveling Expenses	173.38	6,617.39
To amount paid to W. J. Morgan for services rendered to W. J. Shaw		6,000.00
		14,654.47

(Testimony of Louis R. Jacobson.)

To amount paid to Frank S. Tyler as share of profit on sale of Consolidated Mine stock. Total consideration received therefrom—$43,678.05; Frank S. Tyler receiving 20% thereof in accordance with agreement	8,735.60
	23,390.07
Division of Community Property Income	
50% to Edna F. Shaw, my wife, who has filed separate Income Tax Return	37,061.68
	$60,451.75''

(Mr. Shaw's Income Tax return for '34 offered.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 36") [181]

Nothing is reflected on Mr. Shaw's income tax return for 1934 showing income from the Tyler agreement. It is marked 36 in evidence. As to Exhibit No. 34, for identification, 1937 income tax returns, by W. J. Shaw and Edna S. Shaw jointly—I don't think I prepared that.

(The document referred to was received in evidence and marked "Government's Exhibit No. 39.")

I prepared this Exhibit No. 34 for Edna S. Shaw in 1935. It has a relation to Mr. Shaw's income tax return for the same year, to pick up her community income.

(Testimony of Louis R. Jacobson.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 34.")

GOVERNMENT EXHIBIT NO. 34

"INDIVIDUAL INCOME TAX RETURN

* * * * * * * *

For Calendar Year 1935

* * * * * * * *

EDNA F. SHAW
1417 San Remo Drive
Pacific Palisades, Los Angeles, California

* * * * * * * *

11.	Other Income (State nature) (Use separate schedule, if necessary) Community Income	22,978.95	
12.	Total Income in Items 1 to 11		22,978.95
*	* * * * * * *		
20.	Net Income (Item 12 minus Item 19)		22,978.95"

As to the one Exhibit 33 for the year 1934—that return of Mrs. Shaw's has a relation to Mr. Shaw's income for that year, taking up the community income.

(The document referred to was received in evidence and marked "Government's Exhibit No. 33.")

As to Exhibit 35 for Mrs. Shaw for the year 1936—the same applies.

(The document referred to was received in evidence and marked "Government's Exhibit No. 35.")

(Testimony of Louis R. Jacobson.)

GOVERNMENT EXHIBIT NO. 35

"INDIVIDUAL INCOME TAX RETURN

* * * * * * * *

For Calendar Year 1936

* * * * * * * *

EDNA F. SHAW
1417 San Remo Drive
Pacific Palisades, Los Angeles, California.

* * * * * * * *

Item			
1.	Salaries, Wages, Commissions, Fees, etc. (state name and address of employer) Share of Community Income. See Return of my husband, W. J. Shaw, 634 South Spring St., Los Angeles	37,061.68	
*	* * * * * * *		
12.	Total Income in Items 1 to 11		37,061.68
*	* * * * * * *		
20.	Net Income (Item 12 minus Item 19)		37,061.68"

As to the income tax returns of W. J. Shaw and Company for the years respectively 1935, 1936, and 1937—I prepared the returns for '35 and '36. May I now go back to the W. J. Shaw income tax for '37 and see if I have my affidavit on it; no, I did not prepare it. For the year 1935 W. J. Shaw and Company, I do not find any matters reflected in [182] that income tax report which bear on the transactions here that we have been discussing of Mr. Tyler and Mr. Shaw. As to '35—according to my notation there has been no income reported there, as I state thereon, the corporation had no earnings during 1935. W. J. Shaw and Company, to my knowledge, was a corporation at that time.

(Testimony of Louis R. Jacobson.)

As to the '36 return for that corporation—the same would apply. There is nothing there that has any connection with the enterprise that we have been discussing, that is, Tyler partnership nor Consolidated Mines. With reference to W. J. Shaw and Company for 1937, it shows no income. Of five income tax returns of the Consolidated Mines of California, a corporation, the first one for the year 1935 shows no income. And the reason for that was the corporation was incorporated as a skeleton corporation but hadn't actually entered into business. I prepared this return for 1935. It was not prepared from the books and accounts of the corporation. That was prepared from the black book. There was a minute return of about $941 as shown thereon that had been deposited in the account of Frank S. Tyler, and I took the position that it was the property of the Consolidated Mines and was subsequently transferred to the books of the Consolidated Mines by charging Tyler for that amount. I prepared the income tax return for the year 1936 for the Consolidated Mines of California. It shows gross receipts of $12,891.87. And the loss for the year of $5,748.68. I prepared income [183] tax return of the Consolidated Mines of California for the year 1937. The gross income that shows for the Consolidated Mines of California for the year 1937 is $15,237.96. The net loss of $1,972.26. I did not prepare income tax return filed for the Consolidated

(Testimony of Louis R. Jacobson.)

Mines of California for the year 1938. (Stipulated to)

(The documents referred to, income tax returns of Consolidated Mines of California, were received in evidence and marked "Government's Exhibit No. 46," "Government's Exhibit 47," "Government's Exhibit 48," "Government's Exhibit No. 49," "Government's Exhibit No. 50," respectively.)

(Income tax return for W. J. Shaw & Company for the year 1938, which shows no income.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 45.")

(The documents referred to, Income Tax returns of W. J. Shaw and Company 1935, 1936 and 1937, were received in evidence and marked "Government's Exhibit No. 42," "Government's Exhibit No. 43," and "Government's Exhibit No. 44," respectively.)

(All subject to reservations.)

In the income tax returns for the years 1935, '36, and insofar as I made them for the year 1937 for Mr. Shaw, I did not mark it as income for him, all of the income from the Tyler partnership agreement and thereafter deduct 20 percent as going to Mr. Tyler. Not the Tyler partnership agreement, but the proceeds from the sale of Tyler's stock. I construed that as being income to himself, less the

(Testimony of Louis R. Jacobson.)

amount that [184] was due Tyler on the partnership agreement. I first put down the income tax returns for the years '35 and '36, all of this income, and then cut back or deducted from that 20 percent as going from him over to Tyler. I didn't prepare the '37 return, personal return, for '37.

During the time I was making up those two gentlemen's income tax returns I operated under Exhibit 74. Most of Mr. Shaw's income for the years 1935, '36 and '37 did not come from the source of this document 74, which is based on the Tyler partnership agreement. There was income on the settlement of the Monolith suit; there was receipts —I wouldn't call it income because there is a question there—receopts from the Mountain King Mine. A considerable sum was taken in on those two projects. Mr. Shaw first had an income from the Mountain King Mine in 1936. Partially in '35 and the greatest part in '36. I wouldn't want to call that income. I will say receipts. These income tax returns show, so far as I made them up, the correct income as I had it given to me. And during all that period until August of 1937 I was handling Mr. Shaw's accounting on his returns and keeping records for him. One of the primary reasons for the so-called black book was that I would have accurate records for that purpose. I did not, at any time, prepare a financial statement of the condition of the Consolidated Mines of California to be sent

(Testimony of Louis R. Jacobson.)

to the stockholders of that corporation. In composing those circular letters, that [185] were sent to the Consolidated Mines stockholders, I would say that Mr. Shaw would collaborate with Mr. Morgan and Frank S. Tyler, and as I recall Charley Wohlberg was in on a few of them. There was discussion generally in respect to some of those letters. As to Exhibit 5, I find on the postmark of the envelope the date of July 7th. That was after my time there, or I was not interested.

As to this two page letter on the Consolidated Mines of California stationery, July 12, 1935, which is a processed letter and has initials down in the lower left-hand corner on the second page of "FLW:S."—I do not have any recollection of who composed or all that collaborated in composing that letter. That letter pertained to the sale of Tyler's stock, if I am not mistaken, and also the mention was in that letter, if I recollect, George Hatfield's name was taken exception to by George Hatfield. I know Hatfield wrote a letter or called up Jack Shaw or someone in the office and told them he didn't like the use of his name in any business deal.

There is another letter. This is more of a general letter to the stockholders, and there might have been objection. The only objectionable point possibly in this whole letter would have been the mention of George Hatfield's name therein, but I have my doubts as to this being the letter which I am

(Testimony of Louis R. Jacobson.)

referring to. I note that the initials are apparently "FLW," or Wikoff, and it apparently was signed [186] by W. J. Morgan. I do not know about a letter dated September 1, 1937, which is Exhibit No. 16, with the initials "DD" in the lower left-hand corner. I have no recollection of this letter of June 12, 1935. I might have seen the letter, but the other letter just stands out in my mind as being the letter on which the discussion was on, but those are similar form letters that were sent out to the individual stockholders. I did not hear Mr. Shaw discuss with the stenographer or Mr. Tyler or Mr. Morgan or Mr. Wikoff or anyone else the composition or makeup of any of these circular letters before they were mailed. I would not say he did not. As to this letter of September 16, 1935—I notice it has no initials on it. I remember that there was a discussion in regard to this letter. I think Gilbert came down to Los Angeles at the time to discuss the progress of the property and I believe just about that time, too, the question arose as to whether the time was right for the construction of the mill. And I remember that a letter in this form was dictated—by whom, I can't say; it might have been Tyler; it might have been Shaw; it might have been Wikoff, either of the three or four gentlemen—but I recollect this letter. I saw it before it went out. There was not a duplicating machine in the office to prepare these processed letters. I do rec-

(Testimony of Louis R. Jacobson.)

ollect a Miss Campbell who carried on her business; it was to prepare such letters or process such letters. She had an independent business outside of our offices. [187]

As to most of those letters being processed to the extent of the date and the body and the signature, and then up at the top there is a place for the addressee that is typed in for each individual person to receive the letter. On several occasions that was done at the office at the Banks-Huntley Building. When there were a great number of such letters to be sent out, we would give her the numbers and addressers of the Monolith cards, that is, the members of the committee, and she would do all the work, take care of all the mailing. By that, I mean Miss Campbell, that is, if there were a great number. I don't recollect where her office was located. I think I engaged her on the first job, because we needed someone to do the work, and I asked my brother-in-law if he knew of any young lady that did that work, and he sent her over. I told her to take this copy and process the letters and take a list of the names that I gave her and mail them out. On occasions where possibly I might have done it, or Miss Stroatman or Tyler, whoever was in the office at the time, if a letter had to be taken care of, whoever, as I stated, was in the office, who had prepared the letter or had gotten all the cards out, would give it to the young lady to be processed.

(Testimony of Louis R. Jacobson.)

That was done in the regular course of the business. There was another girl, I recall. I believe there was someone else in the office before she was employed. I think a Miss Robinson—I don't recollect the name, —but there was someone else [188] there. After Miss Stroatman came, she stayed the same length of time I did. The other girl who preceded her was a Miss Robinson or Misss Davidson. I recall the occasion when a telephone call was put through from the offices there to Honolulu to a Mrs. Pew. Mr. Shaw conversed with her over the telephone. That was the latter part of '35. Thereafter a transaction was entered into by Mrs. Pew in which she acquired stock in the Consolidated Mines of California. The investment was 15,000 shares of Consolidated Mines for $30,000. That was not entered in the Tyler account in the black book. The transaction of Miss Franklin, in which she acquired stock of Consolidated Mines, was not entered in the Tyler account in the black book. From Exhibits in front of me I cannot tell the record showing cash withdrawals from the Frank S. Tyler account for the years 1934, '35, '36, and '37, but only for '34 and '35. I do not find a withdrawal by Mrs. Edna S. Shaw in the year 1935. If any withdrawals were made by Edna S. Shaw out of the Tyler account, I would have ordinarily charged it against W. J. Shaw. I show withdrawals by C. S. Shockley in the year 1935. Shockley presumably got that money. He was not connected with the Consolidated Mines

(Testimony of Louis R. Jacobson.)

of California in any way nor with the Tyler partnership agreement. There was an item of loans paid withdrawn from the Tyler account in 1935. "Notes Paid." I have it recorded here, "$4,986." And an item of interest paid in that year of $140.82. In '34 [189] there was a withdrawal from that account in the name of the Monolith committee. This sheet of receipts and disbursements shows $494.03; and for '35, $3,830.30. Then there is a miscellaneous withdrawal for the year 1934 of $110.22. That might be lumped together with another item which I don't recognize. Just a little dumping ground of items that I couldn't put to any particular account. The figures I have been giving from Exhibit 73 were made up from the Tyler black book.

Cross Examination

As to this letter of August 7, 1935, signed by W. J. Morgan to Mr. Cline—I recall seeing that letter before or a duplicate of it. There was discussion in the office with regard to the sendng out of this particular letter. I believe that discussion was between Mr. Morgan and myself. My recollection is that there was some difference in opinion between Morgan and Mr. Shaw as to some of the wording in this letter, and I know there was quite an argument over it, and there was a slight change made in it. I do recollect that there was a discussion, particularly with reference to this letter so far as the

(Testimony of Louis R. Jacobson.)

last paragraph is concerned, with respect to the financing of the property. That reads "The financing of the mill has been placed in the hands of Mr. Frank S. Tyler who, as secretary-treasurer of the company, is acting as an individual in the financing"—and, as I say, I don't know whether—Morgan is the one that discussed the matter with [190] me, and I know they had quite a row previously at the time he came out of Shaw's office, and I think it was Morgan that stated that the word "financing" shouldn't be included in that letter, that it was not proper because Tyler was not financing the property. My recollection is that the letter was stopped. I don't know how many were mailed. I recall in the Tyler partnership agreement there was a provision for a mill within 90 days. The time became extended beyond the 90 days before doing the work on the mill, on the advice of the engineers. I think it was Reed Sampson. The advice was that they should go ahead and do considerably more development work to determine definitely as to the type of mill and location of the mill. Now, the question of the type of mill is vague, but I do remember that the main discussion was with reference to the location of the mill. There were not any moneys expended on the properties that are not reflected in the Tyler account, that I have any memorandum available here at the present time, but there were certain moneys expended by Mrs. Edna Shaw or moneys that she had advanced to the properties, and

(Testimony of Louis R. Jacobson.)

I think the money was sent up to the bank, the Bank of America, at Jackson, and that was the early part of '34. Those moneys were for carrying on the operation of the mine, the first few months of its operation. As to the $7,000—before I could definitely state that $7,000 has not been spread on the books, I would have to examine that memorandum and check it back [191] with the records to determine as to whether or not that $7,000 has been shown on the books here. My recollection is, and from the memorandum I have seen notation thereon, that that money had not been taken out of the books of account. I have seen it in their files. There is a memorandum, I think, in the file of Mr. Hughes there that shows about $7,000. I haven't got the exact figures in my mind and, as I said, I would have to check back with the records. As to the $7,000—the memorandum shows what is was used for. I think it was used in the operation of the mine. Part of it went to the payment on the property, one item of a thousand dollars recorded therein that went to Guy Graves for legal expenses, and other odds and ends that went to the account for the benefit of the mine. As to whether that $7,000 was used to keep the McKisson option in effect—that is what the detail of that memorandum indicates, that payment had been made for the benefit to keep the property alive, the option alive, and that there was a notation on that particular memorandum stating that none of those amounts had been recorded on the

(Testimony of Louis R. Jacobson.)

books of the company or in Tyler's account, and, as I stated a moment ago, to definitely determine as to whether or not they had been recorded either on Tyler's account or on the books of the Consolidated Mines, because expenditures were made on about the latter part of '35 and the early part of '36, I would have to check back with the general ledger and journal to determine definitely whether those [192] items had or had not been spread on the books of the company. They wouldn't be on the black book as far as Tyler's accounts were concerned, because they were paid out of W. J. Shaw's personal account. W. J. Shaw's personal account was in the black book. But you mentioned the Tyler account, W. J. Shaw, W. J. Shaw and Company, and the Tyler account, as well as the W. J. Shaw were in the black book. I am unable to say whether that $7,000 item is reflected in the books.

As to a $53,000 item that was in a letter form that was in the Corporation Commissioner's file at the time of granting the third permit—that is the amount that is about correct. As I recollect, the Corporation Commissioner was then making an investigation of the Consolidated Mines prior to the issuance of the third permit and they requested that I prepare a statement showing the amount that had been advanced or expended for and on account of the mine by Frank S. Tyler and before they took it with them they requested that I initial or sign that statement. That showed in the books of account that existed at that time. Summarizing the various

(Testimony of Louis R. Jacobson.)

records that were available at that time, I prepared that statement for him, indicating that amount of expenditure. In the records that we have here, we would have to add them all together and possibly add Mr. Shaw's advances and possibly that $7,000, that might all aggregate the $53,000.

As to this certificate of Homer J. and Florence B. [193] Arnold, dated December 14, 1936, No. 732. Certificate No. 732 came from Consolidated stock of Frank S. Tyler from certificate No. 716. 716 for 4,000 shares to Frank S. Tyler was transferred from Frank S. Tyler from certificate No. 680 for 5,000 shares. That was dated February 15, 1936. Certificate No. 680 for 5,000 shares was issued to Frank S. Tyler and came from certificate 666, 5,000 shares that has been issued to J. R. McKiver. The certificate No. 666 is an original issue; that is as far back as we can go.

There is certificate No. 679 for 5,000 shares that was issued to Frank S. Tyler on February 15, 1936, and that came from certificate No. 665 for 5,000 shares, which is issued under date of February 15, 1936. There is a stock ledger. 10,000 shares of stock was issued to McKiver, February 15, 1936, under the third permit. I don't know why they gave him 10,000 shares. They had some understanding there, Tyler or Shaw, with Mr. McKiver. He was to receive 10,000 shares. The Woodruff certificate No. 741 is for 30 shares of stock issued to Regina Woodruff on May 13, 1937, and that was transferred from

(Testimony of Louis R. Jacobson.)

Frank S. Tyler certificate dated August 26, 1937, on certificate No. 716 originally for 4,000 shares. August 26, 1937—that was beyond my time.

Goodrich, 740, 18 shares, that is the same transaction. It goes back to certificate 716, and then back, and comes from the private stock. And Voget, 691. That goes back to the other McKiver certificate. And Voget's 696 is out of [194] 676 and 679 and goes back to 679, McKiver.

As to the list of stockholders under certificate No. 3 of the Corporation Commissioner, as to J. R. McKiver and L. D. Gilbert, 20,000—that is the Gilbert who was here testifying that was managing the mine for about three years. The stock books show 10,000 to Gilbert and 10,000 to McKiver.

The Court: I will read it:

"February 8, 1936

"Consideration received Monolith Portland Cement Company, preferred stock 6,755 shares, common stock 4,754 shares, cash $11,399.

"The cost of development work and other expenditures in connection with the mine paid by Frank S. Tyler amounts to approximately $53,000."

(By the Witness.)

The above is a memorandum that I gave and in red pencil I have my name there. I gave that to the auditor of the Corporation Commissioner. And he made me initial it as to its correctness. I do not

(Testimony of Louis R. Jacobson.)

accept Mr. Hughes' findings that have been shown here, as my own.

As to how much was the expenditure that were made on the other claims, the Grand Prize and the Mineral Lode—I don't know. It wouldn't show in the various reports that have been made. If they done any assessment work or any work whatsoever on the claims other than that of the McKisson, I probably would just lump it in wtih the McKisson as one unit. I have [195] always taken those claims as a single unit. There was an investigation made by the Securities and Exchange Commission, with regard to this matter. There was a question raised at various times as to whether they were entitled to any information. Oscar Trippett took the position at various times in his conferences with Jack Shaw that they were not entitled to it. In making up my statement as to the 355 thousand odd dollars valuation of the mine; I took into account certain reports that were made by the Engineer. In the Corporation Commissioner's report attached to the application are mining engineers' reports that I have referred to. The date of the report is October 31, 1934, and it is the McKisson, Grand Prize, and Mineral Lode. It is the only report here that I can find, but my recollection is that I also used the report made by Reed Sampson of the Division of Mines. I don't have his reports. All these are marked in initials "S.E.C.," and are Chaney's. "S.E.C." doesn't mean

(Testimony of Louis R. Jacobson.)
Securities and Exchange Commission, but S. E. Chaney. I took Mr. Chaney's report, having known of him as being a reputable engineer, and also particularly Reed Sampson who I got to know quite well. I accepted their figures. (Examining document) (Reports of Chaney) I was interested only in that little summary down below there which, as I recollect, I used as a basis, without going into all the other reports, although I read them all. So far as getting my original item, I do not find my $355,000 item there. I arrived at my [196] $355,000 item by conferences with Chaney and Reed Sampson. We also had a discussion with Morgan as to what value to set up on the books. I know Tyler was in on the conversation too, and I know that I finally discussed the matter with Mr. Shaw as to whether that was a fair figure.

I took here under ore reserves the engineer Chaney's valuation of ore reserves of $1,815,000. There were figures also here of ores blocked out, probable ore, and visible ore, and all that stuff that the engineers may use those terms for, and we came to a decision that a figure of $350,000 or $355,000 was a fair figure to set up in relation to the total value as placed by the engineers. Here it shows $1,800,000. Of course, the cost of operation and everything else would have to go against it if you carried it on the operations. But $350,000 on an estimated valuation of $1,800,000 is about a sixth. I might say that here we attempted to be as con-

(Testimony of Louis R. Jacobson.)

servative as possible. You undoudtedly have seen lots of mine promotions where they issue a million dollars worth of stock and then set up on the books property valued at a million dollars. It was no par stock, and we could have set any value on it, and we felt that taking a valuation of $350,000 was a fair valuation of that property. It was a guess, that is all it was. All gold mining is nothing but a guess. Mr. Morgan had access to the books and records. I don't think Mr. Morgan went out or used the telephone to solicit. If any certificate holders or [197] interested parties would want to know about the mine, I know Morgan had confidence in the property, and I believe he still has, and he will tell them that it was a good proposition. Mr. Morgan generally carried on his conversations in my office. I do not know of any arrangement between Shaw and Tyler as to the division of any profits in 1934. I do not know of any arrangement for a division of profits until this agreement or rather this memoranda of July 1, 1935.

When the stockholders came to the office they saw whoever was there, whether it was Tyler, Morgan or Shaw. Mr. Morgan was a member of the Tyler partnership agreement. I do not know how much he was signed up for from memory. I would have to refer to the list. I do not know where those are. The only time I had access to that—although they were in the safe, I believe they were in the safe—was when I compiled the records in October

(Testimony of Louis R. Jacobson.)

1934. I had to make use of them to determine the investments by each of the members. (Examining Corporation Commission File) Morgan would not be on that list because the certificates were immediately issued thereafter and his name does not appear here insofar as the stock ledger is concerned. All I know is that Morgan appeared on those lists. Any information, of course, which I can give now would be nothing but hearsay. When I came into the picture a good deal of the stock had been sold, disposed of, and all I had was just those blank—those partnership agreements with the appendages thereto indicating [198] the investments by these various members. The certificates that he was supposed to turn over stood in the name of Mrs. Morgan. I was informed that both the money consideration, if it was ever given to anyone, and the certificates were cancelled out. In other words, it never got into the hands of Tyler. He never got so far as to be a stockholder in the new company.

As to Mr. Shaw's personal income—he had other transactions where he bought and sold stock and made income. As to this Pew transaction—I did not speak of that having subsequently been reflected in Tyler's account as shown in the black book. I don't know. Moneys were transferred from W. J. Shaw to Tyler as he required money, but so far as that particular item in the full amount of $30,000, I can't say that that was transferred in toto. Shaw was dealing in other matters with Mrs. Pew than

(Testimony of Louis R. Jacobson.)

this particular item of 15000 shares at $2.00 a share, —$30,000. In setting up the receipts of Frank S. Tyler—there were loans, money transferred, to Tyler from Shaw. I don't know—I can't say that they were—it might be construed as a loan, but then if Shaw required that money, if there was any excess money in Tyler's account, then he could draw on Tyler. Mr. Tyler was not in any way interfered with in drawing on his account that I know of. In the Tyler and the Shaw accounts, the funds were intermingled. Mr. Shaw could draw on Mr. Tyler's account, but Tyler could not draw on Mr. Shaw's account. [199] I didn't keep track of what belonged to Mr. Tyler in his account and what belonged to Shaw in his account. It would just be entered on Mr. Shaw's account as being a receipt on his records and disbursements on Tyler's records, more of the nature of transfer of funds from one to the other. There would be a credit and a debit from one to the other.

(Copy of List of names making up 90,000 shares offered.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 75.")

(Testimony of Louis R. Jacobson.)

REGINA WOODRUFF

a witness for the Government, testified as follows:

Direct Examination

I have my stock certificate with me.

By Mr. Norcop:

Q. Now, this certificate which is photographed in the indictment, No. 741, for 30 shares is dated the 13th of May 1937, and did that come to you through the United States mails, Miss Woodruff?

A. It did.

Prior to receiving this I had had a transaction with the Consolidated Mines of California. I talked with someone who was there and said he was Mr. Shaw. That was by telephone. I called up the office and asked for Mr. Tyler. Most of the letters which I had received had been from Mr. Tyler, and I had called once or twice before and I asked for infor- [200] mation and had talked with Mr. Tyler. I asked for Mr. Tyler and was told that he was no longer in the office, but that I might talk with Mr. Shaw, and that was the first time that I even knew that Mr. Shaw was connected with the thing at all. I hadn't had any information in regard to the Consolidated Mines for some time, and I wanted to know what was being done, and why, [200a] and just what progress was being made, and he assured me that everything was fine and that he was working without salary and he was hoping that the thing

(Testimony of Regina Woodruff.)

would be paying very, very soon because he wanted to be drawing a salary, and that he was quite sure that it would be paying us dividends and we would get our money back within a reasonable length of time; and he wanted me to convert my Midwestern stock into the Consolidated Mines, and he offered me—I had 30 shares of Midwestern, Monolith Midwestern,—and he offered me 60 shares for it. I think that is the substance of it.

I had a certificate for 30 shares of Monolith Midwestern stock, and Mr. Shaw's offer was to give me 60 shares of this Consolidated Mines for that. I sent it in and I received through the mails this certificate and I immediately called the office again and at that time I asked for Mr. Shaw and said that I had been told that I would receive 60 shares and had received only 30, and he said, "Well, that was a very serious mistake," and he would see that I got the other 30, which I did.

(Certificate offered)

(The document referred to was received in evidence and marked "Government's Exhibit No. 77.")

Cross Examination

I am a school teacher. I got another 30. I would be very happy to show it to you. My certificate is for the Monolith Portland. I had both common and preferred Monolith stock. I had 15 shares of preferred and 15 shares of common, both of which I

(Testimony of Regina Woodruff.)

had bought through Mr. Shaw's office quite [201] a number of years ago, and that was converted over into this 123 shares. I don't know how much was for the common and how much for the other, because I got the one certificate and I don't know what the basis was there.

I reside in Los Angeles. [202]

MARSHALL HOLDEN

a witness for the Government testified as follows:

Direct Examination

I am in the trust department of the Security-First National Bank. The corporate trust section. I have been there since 1926. We have general supervision of the records of the Monolith Portland Cement Company. Our bank is transfer agent for the company. I have the records showing the stockholdings in the Monolith Portland Cement Company for Sylvia A. Morgan. She was a holder of both preferred and common stock. She held 1984 shares prior to May 17, 1932. Those shares were transferred on May 17, 1932, to William J. Morgan. They remained in his name until December 15, 1933, when they were transferred back to Mrs. Sylvia A. Morgan. They still remain in Mrs. Morgan's name. Those shares, since the 15th of December 1933, have at all times remained in the name of Mrs. Sylvia

(Testimony of Marshall Holden.)

A. Morgan. Mrs. Morgan was the record holder of 640 shares of preferred stock and on May 17, 1932, those were transferred to William J. Morgan and remained in his name until December 15, 1933, when they were again transferred to Mrs. Sylvia A. Morgan. They have since remained in her name. The records show no other ownership by William J. Morgan of preferred or common stock in the Monolith Portland Cement Company. (Photostatic copies offered).

(The documents referred to were received in evidence and marked "Government's Exhibit No. 78.")

JAMES W. FROMM

a witness for the Government, testified as follows:

[203]

Direct Examination

I am with the California Bank here in Los Angeles at the Head office. I have a signature card in the name of Frank S. Tyler. The account was opened March 20, 1934, commercial account. I have an authorized signature signed Frank S. Tyler by W. J. Shaw, power of attorney, dated February 26, 1934. That is the principal signature on the name card. The original account in the name of Frank S. Tyler and the power of attorney account of Frank S. Tyler by W. J. Shaw. The next account I have in the commercial account in the name of Mrs.

(Testimony of Marshall Holden.)

Edna S. Shaw, which was opened April 25, 1934, and I have a power of attorney account of Edna S. Shaw by W. J. Shaw dated April 2, 1935. I have another power of attorney, Mrs. Edna S. Shaw by W. J. Shaw, which would indicate that the original power of attorney was cancelled on July 11, 1934, and the second power of attorney was cancelled October 18, 1939. Then I have a commercial account in the name of W. J. Shaw and Company which opened December 16, 1935. (Photostatic copies offered)

(The documents referred to were received in evidence and marked "Government's Exhibit No. 79.")

FLORENCE STROATMAN BARDON

a witness for the Government, testified as follows:

Direct Examination

I sought employment at a set of offices in the Banks-Huntley Building some time in the year 1935. When I went [204] into the offices—I had been sent there by an employment agency and I had a card from them—I presented *to* to someone whom I believe to be Mr. Tyler. I gave my name as Florence Stroatman at that time. That was the business name that I always worked under. I had a talk with Mr. Shaw that day. When I first went there, it was—I think it was in January of 1935. I con-

(Testimony of Florence Stroatman Bardon.)

versed with Mr. Shaw in the office which he used as his office in that suite. The conversation was just general as to my qualifications and experience. Later, I got a call to come down for employment, and I went back in April of 1935. When I first returned there to commence employment, I spoke with Mr. Shaw. I couldn't tell you now who greeted me at the door. I entered upon my duties. As to compensation nothing was said about who would give me my compensation. The compensation that was stipulated to was $20 a week. My duties when I commenced to work there were general stenography. I answered the switchboard, I acted as receptionist, and performed all the duties of a general stenographic nature around the office. I was the only secretary in the offices there, full time. My employment continued until they moved their offices to Santa Monica in 1937. I was down in Santa Monica in the offices for some purpose for a very short time after the move. I saw occupying the offices during the time that I was at the Banks-Huntley Building, Mr. Shaw, Mr. Tyler, Mr. Morgan, Mr. Jacobson—numerous others that came and went. Three rooms were in [205] the suite. On entering the office people would enter into the reception room, and I was there. Later on Mr. Morgan had a desk in there just opposite mine. But that was after I had started working there. I took dictation in shorthand. I received dictation while I was employed there, from nearly everybody that

(Testimony of Florence Stroatman Bardon.)
came in. Mr. Morgan and Mr. Jacobson, and I have written numerous personal letters for other people that came in, for Mr. Reed Sampson, Mr. Alexander, Mr. Chaney, and any number of others that came in. Letters were prepared to be sent out to holders of stock in the Consolidated Mines of California, and they were sent out thru the mails. There were letters typewritten and processed. We did not have equipment in the office there to do processing. We used to call a Miss Campbell to do some of it. I have called her, under Mr. Jacobson's direction, a number of times and had her send over for a letter, but just whether she was given a list on those occasions or whether I typed the envelopes and filled them in the office, I can't recall those incidents now. When I had the duty of sending out a large list of letters, I prepared the envelopes first, and I found that the simplest method from my own work. As to those names that I put on the envelopes, any that were sent to Consolidated, were taken from the list of the subscribers or owners of stock in the Consolidated Mines of California. We used individual stamps on those letters. When I was preparing a circular letter to send out to the [206] stockholders, I stamped them in addition to typing the envelopes. After I finished the job and had them ready for mailing, I proceeded to mail them. On some occasions I was assisted in the mailing process by some of the other folks in the office. They were Mr. Tyler, Mr. Jacobson, even Mr. Alexander

(Testimony of Florence Stroatman Bardon.)

has helped me fold some of them and put them in envelopes. Mr. Morgan has helped me. (Examining a file, that contains a bundle of circular letters, in a file called "Circular Letters,") This looks like the one I used to keep, in a file cabinet, general file cabinet. (Examining documents) I have gone through the list of the form letters, or whatever this file is, and have segregated all the documents that I either know I didn't prepare or that I am doubtful about. These are all letters which I prepared, all right, but I can't remember each individual instance when I wrote them. I identify them by letter "S" on there and the signatures, the general set-up. I wasn't paying particular attention to the contents; when I saw that letter "S" down there as the stenographer's letter, I know I was the "S" in the office, so the "S" on them would be mine.

(The document referred to was received in evidence and marked "Government's Exhibit No. 80.")

(Examining document) As to this form letter dated July 1, 1937, addressed to Laura I. P. Franklin, P. O. Box 254, Victorville, California, and the original from which this [207] processing was done, the fact that my initial is on there would indicate that I had done it, I had written up the letter. I have finished reading it.

As to these three letters, all of them having that same date, but addressed to different persons and all

(Testimony of Florence Stroatman Bardon.)
of them, having the initials "FST"—those initials would indicate Mr. Frank S. Tyler, and then the ":s" would be mine.

The offices in the Banks-Huntley Building were closed up just about the end of June, and it is my understanding that they had engaged the offices in Santa Monica at least a few days prior to that time, but we did send out—Mr. Jacobson and I were still in the office downtown—and we did send out some letters to people and apprised them of the change of office address and this must have been the one; because the next to the last paragraph recites: "We have moved to our new location, Bay Cities Building, Santa Monica". And the stationery had already been printed with Bay Cities Building, Santa Monica, California, with the phone number. Mr. Jacobson and I were still downtown and we sent them out.

(The document referred to was marked "Government's Exhibit No. 81 for identification.")

(One to Miss Margaret Gaud) also
(The document referred to was marked "Government's Exhibit No. 82 for identification.")

(One to Mrs. Alberta E. Stearns)
(The document referred to was marked "Government's Exhibit No. 83 for identification.")

[208]

(Examining document) This letter dated March 8, 1937, on the stationery of W. J. Shaw & Company was written by me and it was signed by Mr.

(Testimony of Florence Stroatman Bardon.)

Shaw. I recognize his signature there. And my initial "s" down here. That is an original letter.

(The document referred to was received in evidence and marked "Government's Exhibit No. 84.")

(Three other Letters offered.)

(The documents referred to were received in evidence and marked "Government's Exhibit Nos. 81, 82, and 83," respectively.)

Mr. Norcop: On the letterhead of W. J. Shaw & Co. Investments. 634 South Spring Street, Los Angeles. Trinity 9606. Established 1914.

"March 8, 1937

"Mr. James Kruse
"1127 Laguna Street
"San Francisco, California.

"Dear Mr. Kruse:

"My reason for not answering your letter promptly is that I have been expecting to come to San Francisco every day for some time, and I thought it best to have a personal talk with you, to go over the matter, so that you might understand the whole situation.

"I will be in San Francisco very soon now and will give you a call upon my arrival.

"With kindest regards,

"Yours very truly,

(Signed) "W. J. SHAW." [209]

(Testimony of Florence Stroatman Bardon.)

(By the Witness) That is Mr. Shaw's signature. There were not any stockholders' meetings of the Consolidated Mines of California while I was employed by the companies there. Not to my knowledge. In the course of my duties, I did from time to time place long distance telephone calls as secretary in the office for persons in the office. There were calls placed to the mine, or its location up in Calaveras County. To reach the mine I would call either Mokelumne Hill or Jackson. It must have been Mokelumne Hill. I recall placing telephone calls to Honolulu. I handled the placing of that call. I was calling Mrs. Pew in Honolulu. I don't really know who asked me to place it. However, Mr. Shaw did talk with her. As to whether subsequent to this telephone conversation, Mrs. Pew made an investment in the Consolidated Mines of California—I don't really know whether she did right after that phone call or not. She did at one time make an investment. I was not the bookkeeper.

As to Exhibit No. 59, which is a processed letter, of July 1, 1937, being addressed to John W. and John Wesley Cline, Route 1, Box 5, San Jose, California. This is the same letter that I saw a minute ago. The signature at the foot of the letter was one of the original signatures. It is Mr. Frank S. Tyler's signature. (Examining document) This letter of April 9, 1937, addressed to Mrs. C. E. Seeger is an original letter. This one is signed for Mr. Tyler

(Testimony of Florence Stroatman Bardon.)

by me. Now, this may be a letter which I answered for him; [210] because I did that from time to time, if there was nothing except the sameness to report to people, or I happened to know what the correct answer would be to any situation they might have been inquiring about I would have answered it myself. I did that in the regular course of my employment. If they were around to sign them, they would sign them. That one addressed to William and Julia A. Schumacher, Eugene, Oregon—the same situation would hold with this letter—being a stockholder, they would have received one.

As to this July 1st letter that is filled in with the name of Mr. Augustus E. and Lillian B. Gardner, Forest Grove, Oregon, my comment would be the same about that as the last one I have just examined. This one that may be dated April 1, 1937, to Grace Hayes, Route 1, Box 270, Fresno, California. It is signed "Frank S. Tyler by S," my initial. That is my signature. I would say it was mailed by me, after it was prepared.

As to this one of the July 1st letters to Mrs. Mary M. D. Craig, R.F.D. No. 1, Riverdale, California—my answer be the same on that letter, as to the preparation and the mailing. (Examining letter.) This one March 30, 1937, addressed to Mr. Garfield Voget, Hubbard, Oregon, is an original letter. I signed it for Frank S. Tyler and I assume mailed it.

As to exhibit No. 54, which is a stock certificate No. 742 of the Consolidated Mines made out to the

(Testimony of Florence Stroatman Bardon.)

names of J. C. [211] Goodrich and E. M. Goodrich, calling for 18 shares, and dated the 8th of June, 1937; the signature below that date is Frank S. Tyler; and the signature over to the right is Henry Wikoff—H. L. Wikoff it is signed. He was an officer of the company. Anything of value would be mailed registered mail so they would be too. I used to keep the pink cards we got back in a stack, but that stack was kept either in the file cabinet or in the safe.

DOROTHY DRIVER,

a witness for the Government, testified as follows:

Direct Examination

About July 10th, 1937, I went to work for Mr. Shaw. I was employed in the Bay Cities Building about July 10th by the Jumbo Consolidated Mines and the Consolidated Mines of California, William J. Shaw & Company. Mr. Shaw employed me. I had a conversation leading up to the employment—the substance of which was that he asked for my qualifications. He was interested in whether or not I knew bookkeeping and simply stipulated that it would require the double entry system. And I stated that I had a knowledge of double entry system in bookkeeping. Mr. Jacobson was supervising the bookkeeping. Mr. Jacobson was not spending full time in the offices. I guess I made entries in the

(Testimony of Dorothy Driver.)

books of the Consolidated Mines of California after I was employed. My employment was of short duration. I was there five months. That would be to the latter part of November. I was succeeded by a so-called tax expert by [212] the name of Goeing. I was gone and he was going. I believe no stock was issued while I was employed. I probably made entries in the journal and the cash receipts record, the check record, and payroll record. (Examining entries.) This is back in '36. This is my writing on the check record, and I see my handwriting in the month of August of 1937. It should have commenced about along in there, I think. It continues on the next page for September and through September, and October, is mine. In the journal, again it is in August. Nothing in November. Cash received shows June 1937, and I had never heard of that. It shows my writing, but I had never heard of it, but it must have been receipts, nevertheless, in that month. That shows on one page. It is June, July and August. And turning over in the next page to September and October. And the last third of that page is in someone else's handwriting. (Examining ledger.) Under "Bank of America, August 1937," I show receipts and disbursements in August, September and October.

Compensation insurance deposit—August. There is one entry made by me.

Mill and equipment—September, one entry.

(Testimony of Dorothy Driver.)

Looking at the liabilities account. F. S. Tyler, two entries, August and September—there are more than two entries, but entries made in August and September—October also. George Porteous—one entry. You can see the bookkeeping wasn't heavy. Sales, gold shipments—three entries, [213] August, September and October. That is '37.

Compensation insurance—entries in August, September and October.

Engineering fees—October.

Freight and drayage—October.

Labor—August, September and October.

Miscellaneous—October.

Office expense—August, September and October.

Repairs—October.

Supplies—August and October.

Taxes—August, September and October.

Water—October.

That completes the book. Those entries were made by me in the regular course of my employment. I must have received instructions from Mr. Tyler or from Mr. Jacobson. I did not receive any instructions from Mr. Shaw pertaining to the bookkeeping.

As to a processed letter dated September 1, 1937, filled in with an addressee, the name being Mr. Patrick F. Murphy, 233 North Third Street, San Jose, California—as I recall, this was a letter that I typed from a letter written in longhand. For that

(Testimony of Dorothy Driver.)

reason, I put only my initials. If I had known the originator of the letter, I would have indicated his initials. I don't recall who prepared the longhand that I used. The signature on the letter is H. L. Wikoff. It is typed in, "Consolidated Mines of California, by H. L. [214] Wikoff, President." I don't remember who took care of the mailing of circular letters like this one of September 1, 1937. The original was typed by me, and then it was sent out to a multigraph concern there in Santa Monica. While I was the secretary, I recall but this one circular letter being sent out. The multigraphing of this was done by a man who has since died. They were addressed in the office. I did that. I prepared the envelopes together with the letters. I don't believe I mailed the mail. I think the post office was right across the street from our office, and Mr. Tyler would often take the mail out. I might have put a letter in the chute, in the building, now and then.

As to the September 1, 1937, letter—I remember one form letter that was prepared, and it had several boxes of the letters. My part in the preparation of those was simply the insertion of the name and the addressing of the envelope.

(Dodson Letter offered.)

(The document referred to was marked "Government's Exhibit No. 85 for identification.")

As to the source of the names I used on the envelopes when I was addressing them—I must have

(Testimony of Dorothy Driver.)

gotten them from the stock ledger. They were stamped. We all worked together putting the stamps on. I should say Mr. Tyler helped me. I think I saw Mr. Tyler carry one box across the street, to the post office. I don't know whether I watched the full procedure. [215]

LAURA FRANKLIN,

a witness for the Government, testified as follows:

Direct Examination

In the spring of 1934, I was residing at Malibu La Costa, about 10 miles north of Santa Monica. I had my own home there. Early in that year, Mr. Shaw and Mr. Tyler called at my residence. It was about the end of June. There was present at my home besides myself and Mr. Shaw and Mr. Tyler, a friend of mine who was visiting there. Mrs. Remington of Boston. There was a conversation that took place between the four of us. I was preparing to move, to go away for the summer—I mean, not to move, but to go for the summer, and Mr. Shaw came to see if he could rent the house for Mr. Tyler. He said, "I am Mr. Shaw, who has—who agreed to buy your beach lots, and this is my friend who is a brother-in-law of my wife," something to that effect, "and he would like—I would like to have him —he would like to have this house for a year, and we will pay you $300 for the year's rent."

(Testimony of Laura Franklin.)

As I had been trying very hard to rent that house for some time and wanted to go East, I decided to take their offer. I did take the offer. The rental was paid there. Mr. Shaw paid the rental. I returned about the first of October or thereabouts of the same year. I was then at Mr. Shaw's office in Los Angeles at 634 South Spring Street, and I saw Mr. Shaw there. I had a long conversation with him in his office, where he had his desk and his files. No one else [216] was present at the time. Mr. Jacobson came in once to get a paper that he wanted from Mr. Shaw.

During the summer, while I was away, I think that I wrote to Mr. Shaw to ask if Mr. Tyler would like to buy my property, the house and lot up on the hill. And he said that Mr. Tyler did not have any finances with which to buy. I asked him about this other deal that he had promised to carry on, and he said that his wife had decided that she would rather have mining stock than this property of which I had assigned to him, and for which he and his wife had signed.

And he said, "I think you have come at a very fortunate time. We are having a stock meeting here, a meeting of directors about this mine that I told you about." He advised me to go up and visit the mine up in the mountains when I first met him. And he said that he thought that if I would like to turn in my property on this mine that I would find it very advantageous.

(Testimony of Laura Franklin.)

He said, the best that we could expect nowadays was out of the earth, and that he thought that I would find it quite a good thing, this mine.

And just about that time he opened the door and showed me a large piece of something which he said was ore from the mine in a cupboard, and about that juncture all these gentlemen came out of the other room, and they were introduced as endorsing the mine. Each one said something nice about it, and they said they hoped I would go in with them. Those [217] gentlemen were Mr. Wikoff, Mr. Morgan, and—the engineer was introduced—and I think they said Mr. Gilbert.

As to this document dated October 8, 1934—I have seen that before. I think I received that at the office of the company, Consolidated Mines, in the Banks-Huntley Building.

(The document referred to was received in evidence and marked "Government's Exhibit No. 86.") (Objection was overruled.)

Mr. Norcop: "Oct. 8, 1934.

"Miss Laura Franklin,

"Victorville, Calif.

"My dear Miss Franklin:

"With reference to our agreement, it is understood that you are to have a $6000.00 interest in the Frank S. Tyler agreement in exchange for the Malibu property, there being no cash

(Testimony of Laura Franklin.)

required to be paid by you now or any other time in the future.

"Yours very truly,

(Signed) "W. J. SHAW.

"WJS/B"

(By the Witness.)

In the discussion they spoke about the Frank S. Tyler agreement, and I said, "Well, why do you call it that.

He said, "That is just a name we give it because there is such a long description of the arrangement between the few men who are interested in this mine."

I don't know if I signed that agreement. I don't know whether it was that or something else. I did not at that [218] time sign anything.

As to this letter dated January 28, 1935, on the stationery of the Consolidated Mines of California, I received that letter through the mails.

(The document referred to was received in evidence and marked "Government's Exhibit No. 87.")

Mr. Norcop: This letter is on the stationery of the Consolidated Mines of California, Los Angeles, California:

(Testimony of Laura Franklin.)

"January 28, 1935.

"Miss Laura I. Franklin
"P O Box 254
"Victorville, Calif.

"Dear Miss Franklin:

"I have not heretofore replied to your favor of January 12th because I have been out of the city.

"I have discussed the matter with Mr. Tyler, and he does not feel financially able at this time to buy real estate.

"It is regretable that you decided not to come along with us on the proposition I made you for the reason that the development work at our mines has proven out to be a lot better than any of us had anticipated. The best proof of this fact is the smelter receipts which we are enclosing.

"This ore has, as you will notice, run over $37.00 a ton, and we only shipped one car load for the purpose of getting the exact assays of what the ore would run. We do not expect to send any more to the smelter because it costs [219] too much—and our engineer now advises us to keep it for our plant and get into production.

"If you are in the city at any time soon, I would be pleased to have you visit me at my office.

(Testimony of Laura Franklin.)

"With kindest personal regards.

"Sincerely yours,

"W. J. SHAW (signed)

"WJS: CE"

(By the Witness)

In May of that year, 1935, I went to his office to find out why he had not carried out another contract with me. I had a discussion that pertains to my mining investment. Mr. Jacobson was in the room once in awhile. We (Mr. Shaw and I) again talked about our own transaction and he told me how nicely the mine had been doing, and finally he said, "Well, if I put my name on this—if I carry out this assignment of the other property and if I put my name on this Malibu land up, the house and lot, as well as Mr. Tyler has his name on it, will that be all right, and you will get as a dividend from the mining stocks which we will give you about $75 income dividend, and Mr. Tyler likes the house so much that I am sure he will be glad to give you some of his stock."

I said, "How do you value it?"

And he said, "Well, about a thousand shares would be five or six thousand dollars."

He said, "$75 a month for the mining stock would be [220] better than what you could get for your house, wouldn't it, by the monthly rent?"

And I said, "Why, yes."

(Testimony of Laura Franklin.)

He said, "Could you get the deeds today to the house?"

And I said I would have to go quite a little way to get them, that they weren't there, and perhaps I had better stop and talk to the lawyer about it.

And he said, "Well, I am going away early in the morning and I would be very glad if you could bring them in the morning before I go."

And so I went without asking the lawyer and I brought my deeds over, thinking that perhaps that was the best thing to do, as it would establish his word about this other land that he had promised to take up the assignment, which the bank had been saying he hadn't taken, and that I would get this income after the mine was all shaped up, which he said it was doing rapidly, that the mill was being contracted for, although I don't know that it was there, but then I didn't know how much you had to have of a mill to mine because they had been sending it over to the smelter.

I returned the next day with the deed. I got my deed back and made it over to Mr. Tyler.

The next day when I came back, I saw Mr. Shaw, and he took the deed out in the other room and came back with Mr. Tyler's signature on it, and later on when we were parting, Mr. Tyler said that he was glad to have the land. [221]

This letter on the stationery of W. J. Shaw, dated May 28, 1935 is one of the documents to which I

(Testimony of Laura Franklin.)

have just referred that had Mr. Tyler's signature on it.

(The document referred to was received in evidence and marked "Government's Exhibit No. 88.")

(Objection was overruled)

Mr. Norcop: "May 28, 1935.)

"Miss Laura I. P. Franklin

"P. O. Box 254

"Victorville, California.

"Dear Miss Franklin:

"Acknowledgment is made of the Deed of Trust which is in exchange for certain interest in the Frank S. Tyler Agreement, under which is operated the McKisson, Grand Prize and Mineral Lode Mines.

"In further consideration of the Agreement it is mutually agreed and understood that the beach lot of which assignment of certain contract covering same has been made over to W. J. Shaw, shall be accepted and paid off to the satisfaction of the Bank of America Trust & Savings; and that there shall be no further responsibility or liability on your part in connection with the contract covering the beach property.

"Very truly yours,

"FRANK S. TYLER (Signed)."

(Testimony of Laura Franklin.)

(By the Witness)

This document dated July 15, 1935 bears my signature, and I signed it. I was in the office at the time that I made [222] over the—no, that must have been a little later.

(The document referred to was received in evidence and marked "Government's Exhibit No. 89.")

(Objection was overruled)

This letter dated November 1, 1935, I received through the mails.

(The document referred to was received in evidence and marked "Government's Exhibit No. 90.")

(Objection was overruled)

I received this other letter which apparently was not dated by typewriter, and is on the stationery of the Consolidated Mines of California. This came to me through the mails out at my residence at Victorville.

(The document referred to was received in evidence and marked "Government's Exhibit No. 91.")

Mr. Norcop: "Dear Miss Franklin:

"Acknowledgment is made of your favor of November 5; and in reply wish to say that we have made no extra copies of the Articles of Incorporation because you are the first partner

(Testimony of Laura Franklin.)

to make request for same. Perhaps it did not occur to you at the time you made the request, that the Articles cover 100 to 150 pages. The next time you are in the office he will be glad to explain them to you and answer any questions you have in mind.

"Perhaps you are referring to the liability and voting rights, etc. In respect to this, wish to inform you that [223] the stock is full voting, and non assessable under the law, as it is a California Corporation."

"The property is located 14 miles East of Jackson, California—near Mokelumne Hill. I understand our superintendent is going to put up some signs which will make it easy to locate the property.

"We hope to have the mill in operation within the next ten days.

"Would suggest that you let us know in advance when you expect to go up there and we will give you a letter to our superintendent, who will be very happy to see you, and will show you through the property.

"Very truly yours,

"FRANK S. TYLER (Signed)

"FRANK S. TYLER."

I did not go up to the property. [224]

LAURA FRANKLIN

Direct Examination (Cont'd)

(Articles and Amended Articles of Incorporation offered).

(The documents referred to were received in evidence and marked "Government's Exhibit No. 92.")

In the conversation and I had with Mr. Shaw on the occasion when I agreed to take a thousand shares of Consolidated Mines in exchange for my real estate, I imagine that he said his wife preferred the stocks to something else, preferred the mine to something else; and then I said I didn't know him very well and could he give me some evidence of his good faith, so he showed me some letters that he had from various business people; and as I was leaving and Mr. Tyler came in—as I was going out—he said, "You won't sell these shares, will you?" And I said, "Oh, no, I didn't intend to sell them. I will keep them."

I didn't receive the shares, so a long time after that I wrote to him while I was gone to ask what became of the shares. I received no answer.

As to what was said about how the persons would be participating in this mining venture—when he spoke to me, he said there was just a few men who had been friends for some time and wanted to develop this mine, that it looked so good, and that was in the fall, the previous fall, of '34 when the

(Testimony of Laura Franklin.)

directors were there at the time I mentioned. I was never a holder of stock in the Monolith Portland [225] Cement Company, or the Monolith Midwest Portland Cement Company.

In the fall of 1935, after I had returned, I was again at the offices in the Banks-Huntley Building, after August, somewhere along September or October. As time went along I made little notations to help me remember about certain things that I wanted to know about. I have October 29th, 1935, I seen Mr. Morgan. I went to the office in the Banks-Huntley Building, and was shown immediately into the inner sanctum, where Mr. Shaw usually was, but Mr. Morgan was sitting there. And he said, "Good morning," and wanted to know what I wanted, if I wanted to know about the lawsuit. And I said I didn't want to know about the lawsuit, but I wanted to know where my shares that I was supposed to get. And he said he thought they had all been distributed.

And I said, "Oh, I gave a house and a lot for some and I wondered where they were."

And he said, "I will see about it."

And I think he told Mr. Jacobson to make a note or something of the kind. I did not see Mr. Shaw or Mr. Tyler on that occasion.

I don't think I heard anything in '36. In '37 at least I don't remember whether there were letters exchanged, but in '37 I understood that the office

(Testimony of Laura Franklin.)

had been moved to Santa Monica, and I called and Mr. Shaw was there and I asked him how things were. I think it was in September. I don't [226] think there was anyone else there besides Mr. Shaw, except someone that I didn't know in the outer office.

I asked Mr. Shaw how the mine was and he said, "Well, last year it wasn't doing very well," but they were very encouraged now. And he said, "No one sold their shares."

And then in a few minutes he said, "Except that there are some to be distributed and someone has died, whose name I didn't know because I had never met any of the stockholders, never having had any stockholders meetings, and that these were to be sold, that most of them had been taken up, but if I would like a few more, why, he would be very glad to see that I could get them.

I said, "No," I didn't have any money, or didn't want any more.

There was no stockholders meeting called that I know of until the fall of 1939. November 8th, I think it was. (Examining book) This is my daily notation, diary. It says, "I went to an exciting stockholders meeting." It as at the Lankershim Hotel. The meeting had begun. It was called by someone whose name I didn't know, and it had progressed quite a little ways. They had called on an engineer to describe the mine, and Mr. Shaw came

(Testimony of Laura Franklin.)

in shortly after. They had progressed to the point where they said that maybe they would have to sell the mine, and just then the door flew open and Mr. Shaw came in and said that he would like to stop this meeting, and he had an injunction to stop the [227] meeting, that it was not a real stockholders meeting, that it had been called by postcard written by one person and signed with the name of another and that he did not want the mine sold and he would like to have the discussion go on from there. He looked around and he said, "These are not stockholders, they are mostly proxies," as I remember. Mr. Shaw looked at me. Just as the meeting was breaking up and they were all going out, I asked him if he was still a director, and he said, "Oh, yes."

I said, "Are there any others?"

And he said, "No."

I said, "Do you still have stock?"

He said, "Quite a lot."

Cross Examination

He said he was getting the injunction because the meeting had been called by someone who had no authority to call it. I don't remember who did call it, Mr. Shaw said that it was—I think it was his mother-in-law's name written by his wife, on a postal card.

I owned this property in Malibu in 1934. I bought it from The Ferguson Corporation. They were the

(Testimony of Laura Franklin.)

Ferguson people that had it for Mrs. Rindge at the time. I was about the only person who had a deed to the land. For the land, I paid about $4,000. I deeded it to Mr. Tyler at Mr. Shaw's request. I did not owe money on it. I had paid off the mortgage that I had on the house and lot. There were two pieces of property involved in the transaction with Mr. Shaw. [228] And there is some confusion between them. The others were the beach lots. I had paid part of that and there was about $3900 plus still due on it that Mr. Shaw said he would take up, but he did not. I gave a quitclaim deed to the bank about six, seven months ago, on this particular property. I had no deficiency judgment against me. I had assigned that beach property to Mr. Shaw and he was to take the assignment to the bank and, as I kept—that was one reason I went to his office so often, to find out what he was going to do with it. He told me that he would take it up if I would buy the mine shares, that he would continue to complete it. I do not know whether he paid anything at all on it. I wanted to get rid of the liability on my note. The beach lot was a private transaction in the first place between Mr. Shaw and myself. That is what makes this complicated, because the beach lot was originally a private transaction. I had agreed to buy these lots, then I found that I was going to a great deal of difficulty in selling my house, and in order to pay for these beach lots I

(Testimony of Laura Franklin.)

asked the real estate man at Malibu to see if he could find me someone who would take it off my hands, that I had already paid $2,000, but I would let that go if someone would take up the assignment and pay the rest of it. So I was told that Mr. Shaw would take the lots and he would take the assignment papers down to the bank and pay cash for them. Therefore, I did not go to the bank with Mr. Shaw. [229]

Some time after I was sent a bill by the bank and I asked them if Mr. Shaw had not come in about them. So I went two or three times to the bank and asked if Mr. Shaw had come, and Mr. Shaw was usually ill or had some other transaction which he was trying to swap off for the beach lots, something of that kind, and affairs went on and that was why I happened to go down to the office so often and finally became involved in the sale of the house to Mr. Tyler. In order to settle the whole question, Mr. Shaw promised to take the beach lots, relieve me of all past interest that was due, take the house and give me $6,000 worth of shares in the mine. He did not arrange that I would give a quit claim. Shaw did not arrange any quit claim. I had a letter from the bank saying that the beach lots had come into their hands, and if I would give a quit claim deed that Mr. Shaw said he had never promised, that perhaps he had but he said he had not promised, and therefore if I would give a quit claim

(Testimony of Laura Franklin.)

deed on these beach lots they would call it quits. Mr. Shaw agreed to give me shares and take up the claim. I got shares. He agreed to take the beach lot off my hands. He agreed to get me clear on my liability on the beach lot. I gave a quit claim to the bank about a year or two afterwards, and that ended all liability as far as that was concerned.

My entry of May 28, 1935 is: "Went to see Mr. Shaw, agree about trade and go to San Bernardino. The next day [230] I went back to Los Angeles after going to the bank. Met Mr. Shaw and Mr. Tyler, sell my house for the mine shares." I got my certificate in the fall of '35. (Examining envelope) That is the one the stock came in.

As to this letter of May 28, 1935—"Acknowledgment is made of the deed of trust which is in exchange for certain interest." That is the sale of the house and lot. I suppose the deed that I gave to Mr. Tyler to the land. (Examining document) The real estate man said that Mr. Shaw had gone to his office and signed the assignment to the beach lot and was going to take it to the bank, and I said, "Well, where is my copy?"

And he said, "This is all I have," and this is what he gave me. (Examining document) I afterwards saw the assignment in Mr. Shaw's office. And this was—he told me that if I accepted the amount Mr. Shaw said he would pay for the beach lot, that I would sign this acceptance, and that he had a

(Testimony of Laura Franklin.)

check. So he made out his own check for me for part of that.

The Clerk: The letter of May 16, 1934, to Arthur A. Jones, signed W. J. Shaw, in the nature of a direction, is Defendant's D, and the receipt of May 7, 1934, will be E.

(The documents referred to were received in evidence and marked "Defendant's Exhibit D" and "Defendant's Exhibit E.") [231]

Redirect Examination

I received this letter.

EVA M. GOODRICH

a witness for the Government, was recalled and testified as follows:

Direct Examination

I owned some stock in the Midwest. I had 18 shares, and I received 36 of the Mines. After I made that exchange, that was when I received the certificate through the mail representing the 36 shares of Consolidated Mines.

HOMER J. ARNOLD

a witness for the Government, testified as follows:

Direct Examination

As to this photostatic copy of a certificate of Consolidated Mines of California, numbered 732, for 250 shares of the stock of that corporation, dated the 14th day of December 1936, made out in the name of Homer J. Arnold and Florence R. Arnold, joint tenants with full rights of survivorship, and signed apparently Frank S. Tyler, secretary, and H. L. Wikoff, president—I received the original certificate of which that is a photostatic copy. Prior to receiving it, I was an owner of shares of the Monolith Midwest. In fact, I did have them in both. My stock in the Midwest was sold for $420 and the cash given to me. I had that transaction with Mr. Shaw. That was prior to the date that this certificate of mining stock bears. After that, I decided to put that money into the mine, the Consolidated [232] Mining Company. Most of my talking was done with Mr. Shaw. I put $420 in cash into the Consolidated Mines of California, and then I suggested that if he would, I would like to make it a little more—Shaw was under my care for quite a period of time—say make $80 of it that he would take out in treatments, for a total of $500. Represented by the 250 shares, making it $2.00 a share. Then I received, when the deal was finally consummated, through the mails, this stock certificate No. 732 of which this is a photostatic copy. I have that certificate.

NO. 9916

United States

Circuit Court of Appeals

For the Ninth Circuit.

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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VOLUME II

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SAM GREEN

a witness for the Government, testified as follows:

Direct Examination

My business is broker, stock and bonds. I have been so engaged since 1917. I am the president of Pledger & Company. That is a corporation controlled by me. Commencing in 1935, I had an account for my concern with Florence Stroatman, and with Louis R. Jacobson, and with Frank S. Tyler, and an account with W. J. Shaw, and with W. J. Shaw & Company. In connection with the Frank S. Tyler account, I had a discussion with Mr. Shaw when I opened that account. He did not have any particular discussion with me in regard to the account. The life of the Frank S. Tyler account was two to three years. That would be '35, '36 and up into '37. I handled the buy and sell orders for my firm. Mr. Shaw gave me the instructions on [233] buying and selling items that came to me in the for sale in the Frank S. Tyler account.

With respect to the Florence Stroatman account, my answer would be the same; and with the Louis R. Jacobson account, the same. Checks paid to the persons whose names are appearing in those accounts would be made payable to the names of the accounts.

Cross Examination

There is nothing improper in running the accounts in the names of the employees that I know of. It is common practice for a person to run an

(Testimony of Sam Green.)
account in a certain name and have somebody else who is actually owner of the account the controller. Especially is that true of a man who, like Mr. Shaw, was engaged in selling securities himself.

FRANCES DOYLE

a witness for the Government, testified as follows:

Direct Examination

In the years 1935, '36 and '37 I was a bookkeeper and cashier for Pledger & Company. I kept the records and handled stock certificates, securities, that would come to the office.

Mr. Norcop: All right. I want to prove by Mrs. Doyle that she, which she has already said, that she was a cashier and bookkeeper there for Pledger; that she made the receipts to persons depositing securities with the firm; and that she would give them an original receipt and the books which I [234] have in front of me, some seven of them, would be the carbon copy of the receipt, and that when the transaction was completed, if a sale had been made, that she made out the checks and delivered them to the persons entitled to receive them. Further than that, we have as to both of the transactions named in the indictment the records here of those transactions showing the stock received, what shares, what company, and to whom, as the cus-

(Testimony of Frances Doyle.)

tomer appeared on the Pledger & Company accounts, the check was made payable, and the endorsement of the checks. We have the original checks which are the cancelled checks of Pledger & Company, so that we can trail with respect, I think, to nine or ten of the counts in the indictment the finishing of the transactions. One other thing: May it be stipulated, or do you know, that the checks that the California Bank has rubber stamps on them indicate that they were cashed, that the currency was turned over to the payee and not deposited? I neglected to ask that yesterday.

Pledger and Company's record dated 1/25/37. That the shares of Thomas L. Allen and A. L. Allen, certificate No. 813 of Monolith Midwest, was sold through Pledger and Company on 1/25/37, and paid in the name of the account of Jacobson in the sum of $327.19 on 1/30/37, and there is an endorsement on the back, L. A. Jacobson; the check shows two rubber stamps on the face of it which I am informed indicates it was cashed and not deposited.

[235]

There are several on this next one. We are misled here because a lady has changed her name since she bought the stock. Her present name and as she testified in the case here her name is Mrs. Hanson of Ventura, and she said when she purchased this stock her name was Angele C. Sutton. The records of Pledger show that on September 10, 1935, under

(Testimony of Frances Doyle.)

the name of Angele C. Sutton there were two certificates of Monolith Portland sold, and, if I read the numbers here correctly, it was 6109 and 6228 were the certificate numbers, calling for 120 shares of stock, and the check was for $1,396 even and the endorsement is Frank S. Tyler, and that was deposited.

(It was stipulated that these summaries may be read).

On October 10, 1935, Pledger and Company, showing in the account of Frank S. Tyler for another one of our indictment witnesses, who will appear today or tomorrow, Miss Margaret Gaud, there being a total number of 50 shares, if I am correct in my summation of these figures—I won't read the certificate numbers—and on that same day Miss Alberta E. Stearns had three certificates of Midwest, totaling 90 shares, and that is all, together with somebody else's transaction on the same day that we are not concerned with, which was paid in the form of a check to Frank S. Tyler by Pledger and Company in the sum of $2,155.40, and that was endorsed on a rubber stamp, Frank S. Tyler by blank. There only being one rubber stamp, I assume it was deposited. [236]

On October 16, 1935, a transaction reflecting that Mary M. D. Craig, who testified early in the case, had certificate No. 94, of Monolith Portland—(It was stipulated that the money, as a result of these

(Testimony of Frances Doyle.)

stocks made their way—that is, they were converted and afterwards money went into the account of Tyler).

Mr. Norcop: Here is one check that I desire to introduce because it is the only one that is different.

(Exhibiting document to Mr. Montgomery.)

Mr. Montgomery: We will stipulate that Mr. Shaw's endorsement is on that and it was deposited to Frank S. Tyler. That is all right.

(The document referred to was received in evidence and marked "Government's Exhibit No. 93.")

The Court: This check is a check for $1,419.72, Pledger & Company, and is made to Frank S. Tyler and is marked "For deposit, Frank S. Tyler by W. J. Shaw."

ARTHUR HUGHES

a witness for the Government, testified as follows:

Direct Examination

I am an accountant-investigator with the Securities and Exchange Commission. I have been so employed since November 1935. Previous to that time I have been the office manager and auditor for a member firm of the New York Stock Exchange for approximately 12 years. All together I have had about 17 years of experience as an accountant. [237]

I first visited the offices of the Consolidated Mines in July of 1936 when I commenced the investiga-

(Testimony of Arthur Hughes.)

tion of this matter. The names on the door were Monolith Portland Cement Committee, W. J. Shaw & Company, and Consolidated Mines of California. I went in the office and met Mr. Morgan and Mr. Tyler and Mr. Jacobson and Mr. Shaw, and Miss Stroatman was also there. I examined the books and records of the Consolidated Mines of California, and also the black book which had records of Tyler's transactions in the Consolidated Mines, or at least the transactions were carred on in Tyler's name. I made an examination of the Tyler black book. I scrutinized each sheet thoroughly and then I footed the sheets—the sheets had already been footed, so I checked the footings and test-checked them—and I also cross-checked the footing to see that they tied in with the totals, and when I was satisfied that they were in balance, then I copied—I prepared a schedule from the black book, using the headings as they appeared in this black book on each column, and copied the totals by months onto my schedules. Exhibit 72 for identification, which consists of three large sheets of columnar accounting sheets are the ones I refer to. I copied all the information that was in the black book as of July of 1936, and then in October 1937 I again visited the offices of the Consolidated Mines, which were then located in Santa Monica.

I met Mr. Shaw downstairs and Jacobson, Shaw and myself [238] went up to the office. We went into Mr. Shaw's private office first, and I told Mr. Shaw what I wanted.

He wanted to know why I wanted it, and every-

(Testimony of Arthur Hughes.)

thing else. After a discussion which maybe lasted half an hour, he brought me out there and he told Tyler to give me the black book.

So Jacobson was along with me and I went and examined the black book and brought my schedules up to date from July 1936 up to October 1937. Mr. Jacobson and I checked my figures to test their accuracy and see whether I had made a correct transcription of what I was copying from the black book. He did not object to anything or say that anything was incorrect.

(Schedules offered and objected to.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 72.")

I prepared such a schedule for 1934, '35, '36 and '37, and then I have summarized them, four years together.

(The document referred to was received in evidence and marked "Government's Exhibit No. 94.")

(Testimony of Arthur Hughes.)

(Received as a summary of figures Objection was overruled).

I likewise prepared from Exhibit 72 a compilation showing a summary of receipts and disbursements as per Frank S. Tyler's book showing net profit from sales of Monolith stock, Consolidated Mines stock, sold for cash and cash taken in on the Tyler agreement for the years 1934, '35, '36 and '37. [239]

(The document referred to was received in evidence and marked "Government's Exhibit No. 95.")

GOVERNMENT'S EXHIBIT NO. 95

"SUMMARY OF RECEIPTS AND DISBURSEMENTS AS PER FRANK S. TYLER BOOKS

Showing net Profit from Sales of Monolith Stock, Cons. Mines stock sold for Cash and Cash Taken in on Tyler Agreement:

Receipts	1934	1935	1936	1937	Together
Monolith Sold	$41,822.69	$27,142.16			$68,964.85
Midwest Sold		37,828.94	$13,760.06		51,589.00
Consolidated Mines Sold for Cash			800.00		800.00
Cash Received on Tyler agreement	5,237.00	10,797.72			16,034.72
Dividend on Monolith	667.50	499.00			1,166.50
Pledger & Co. 'Loans'			8,050.00		8,050.00
Total Receipts	$47,727.19	$76,267.82	$22,610.06		$146,605.07
Disbursements					
Monolith Stock Bought		$ 8,301.41	$ 1,653.00		$ 9,954.41
Mine Expenditures	$14,528.42	24,069.36	9,728.31	$285.00	48,611.09
Office Expenses	2,778.17	5,998.85	4,057.97	51.50	12,886.49
Monolith Dividends Refunded		110.00			110.00
Salesmen's Commissions	2,155.91	85.00			2,240.91
Total Disbursements	$19,462.50	$38,564.62	$15,439.28	$336.50	$ 73,802.90
Net Profit per Tyler Books	$28,264.69	$37,703.20	$ 7,170.78	$336.50*	$ 72,802.17"

*Indicates red figures.

(Testimony of Arthur Hughes.)

(Objection was overruled).

This schedule reading, "Statement Showing Net Profit to Shaw and Tyler from the Mining Deal" was not prepared entirely from the schedule or Exhibit 72. I used all the other information I could gather during the course of the investigation, such as, the books did not reflect all of the transactions.

As to what is in the compilation that isn't reflected by the books of the Consolidated Mines or the Tyler black book—there is Mrs. Pew's transaction which amounted to $30,000 additional income, and there is Mrs. Franklin's property which she placed a value of $6,000 on, and then there is a second piece of real estate taken from another party which was eventually sold by Mr. Shaw for $4,000, so there is $40,000 in addition to what is shown in the black book. The $50,000 appeared in the black book, but I did not examine it, because Jacobson told me there was nothing in there which concerned the Consolidated Mines. I have a schedule compiled entirely from accounts in the black book and accounts in the corporate books.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 96.")

(Testimony of Arthur Hughes.)

ARTHUR HUGHES

testified further as follows: [240]

Direct Examination (Continued)

This compilation is a schedule showing the loss, sustained from operations of the Consolidated Mines property for the years 1933 to 1938, and it was taken from both the Frank S. Tyler records and the Consolidated Mines records.

(The document referred to was received in evidence and marked "Government's Exhibit No. 97.")

That is for 1933 through 1938—that is really six years inclusive, but there is very little in '38 and very little in '33. The next compilation in order is a profit and loss statement for the years 1936 and 1937 as taken from the Consolidated Mines Corporation records, and has nothing to do with the black book.

(The document referred to was received in evidence and marked "Government's Exhibit No. 98.")

This third sheet is an analysis of the profit and loss statement for the year 1936 by months showing the profit or the loss for the year by months, taken from the corporation's records, Consolidated Mines of California.

(The document referred to was received in evidence and marked "Government's Exhibit No. 99.")

(Testimony of Arthur Hughes.)

The fourth sheet is a compilation of the profit and loss for the year 1937, and I have analyzed it by months the same as I have done in 1936. The records show a loss for the month of May. Labor costs are made up by a large sum of money that is shown in Gilbert's name as having been sent to the [241] mine.

(The document referred to was received in evidence and marked "Government's Exhibit No. 100.")

Cross Examination

(Questions by Juror Meredith)

I am not a C. P. A. I did not take an examination for it.

J. DALE GOING

a witness for the Government, testified as follows:

Direct Examination

I was employed by Mr. Shaw in the year 1937 down in Santa Monica on the Consolidated Mines of California books. I made entries in the books as bookkeeper. In front of me is the cash receipts record of that corporation and check record and journal. I have made entries in there, in the cash receipts, check record, and journalized payroll. I made entries there closing the year 1937. I believe I saw one place of handwriting other than my own

(Testimony of J. Dall Going.)

after I had completed my entries. I saw several penciled notations, and I believe there was one in ink. They were not mine. I have also examined the journal ledger of that corporation in which I have made the postings, for the period that I have just described.

Cross Examination

Mr. Shaw didn't look at the books very carefully himself. I don't believe he ever looked them over with me. [242] If there was anything I didn't know or understand, I would ask Mr. Tyler, and then Mr. Tyler, if he didn't know, would consult with Mr. Shaw. I consulted Mr. Tyler many times, when I first started. Mr. Wikoff was in the office possibly a month before I left. I did stenographic work. I did more stenographic than bookkeeping. Mr. Shaw was out quite a bit of time, sometimes a week, sometimes two weeks. I was informed that he was ill, and I know that I ordered insulin and received it when it came in.

W. J. MORGAN

a witness for the Government, testified as follows:

I retired from active business a number of years ago, but we had some investments that apparently were getting into difficulties, so I began to look into this Monolith Company down here that we had money invested in, and found a very bad state of

(Testimony of W. J. Morgan.)

affairs there, and it resulted in the organization of the Monolith Stockholders Committee, of which I became chairman, and I think this is the ninth year now that I am on the job and still on the job. That is my present occupation, cleaning up a few ends here and there that were left over by the executive committee and Mr. Shaw, and I presume the matter can be cleaned up probably in another month or two; at least I hope so. In the month of December of 1933, I was so engaged, on the Monolith Stockholders Protective Committee.

At that time, 1933, they were in a bank building— [243] a part of 1933 they were in San Francisco. Some time during 1933 they moved to Los Angeles, or Hollywood, and they occupied offices in the bank building on the corner of Hollywood Boulevard and Highland Avenue. They were there most of the balance of 1933. They moved from Hollywood into the Financial Center Building for a few months—and then they moved to the Banks-Huntley Building on Spring Street. I was making my permanent domicile in the Hotel Oakland in Oakland, California, and had been for 26 years.

About December 19, 1933, I was in Oakland. I received a letter from Mr. Shaw about December 20, 1933. This document is a carbon copy of that letter.

(The document referred to was marked "Government's Exhibit No. 101 for identification.")

(Testimony of W. J. Morgan.)

GOVERNMENT EXHIBIT No. 101

"STOCKHOLDERS COMMITTEE
of the
MONOLITH PORTLAND CEMENT CO.
MONOLITH PORTLAND MIDWEST CO.
704 South Spring Street
Los Angeles, California

Dec. 19, 1933.

"Mr. W. J. Morgan,
Oakland, Calif.

Dear W. J.:——

"I am very anxious to talk to you about the proposed corporation that we are going to form very soon to take over the gold mining properties. I feel quite positive that we have something real in these properties and can make a lot of money. If my plans materialize, you can join us without advancing any money as I feel confident that you and I can work together on this deal without conflict. As I stated to you in Oakland, I would not approach Mrs. Morgan to enter into this deal in any way. She has lost so much money that I do not believe that she trusts anyone and in one way you can not blame her. Of course, on the other hand, she certainly needs your advice and all of our help to realize as much as we can on her stock along with all the other members of the Committee.

"What I propose to do is to organize a com-

(Testimony of W. J. Morgan.)

pany immediately and place the corporation in a position to receive funds, and completely equip the plant which is now on one of the properties with up-to-date machinery which will not cost much as I am informed that we can get into production and start making good money within ninety days. We could use part of these profits to develop the big property, so you can see that we would not need very much money to carry out our plans.

"With kindest personal regards to you and Mrs. Morgan, I am

Sincerely,

(Signed) "JACK"

"S/K"

(Examining document) I received that letter through the mail. I received it from Mr. Shaw.

(By Mr. Montgomery):

Mr. Shaw typed it himself.

(The document referred to was received in evidence and marked "Government's Exhibit No. 102.")

Mr. Norcop: This letter is on a plain sheet of white paper, no letterhead, and the handwriting at the bottom is signed with the word "Jack."

"I sent you a letter some few days that we cannot collect any more money and all collec-

(Testimony of W. J. Morgan.)

tions that might come in must be deposited with the trustee which was appointed by the court and any costs that are paid must be turned over to this trustee and sent direct to the shareholders. [244] Consequently the committee has no money and I am paying rent and expenses."

"The boys are getting ready for the gold mine. It certainly looks good. The report is fine and I am planning on coming north within a few days and we will go from Oakland to the mines. You may expect a wire from me most any time that I am leaving from Oakland. I have no help here so please excuse typewriter mistakes and haste. Will explain everything when I see you.

"Best regards.

"(Signed) JACK."

(By the Witness)

I received another letter dated February 1, 1934, on the stationery of Dos Cabesas Company, cement products, through the mails.

(The document referred to was received in evidence and marked "Government's Exhibit No. 103.")

Mr. Norcop: "Feb. 1st, 1934.

"My Dear W. J.

"Mrs. Davidson has no further work to do and has left. The Court has ordered all collec-

(Testimony of W. J. Morgan.)

tions turned over to a Trustee but nothing is coming in. The Boys have not made any calls since you left. Consequently the Committee is without funds and can't collect any. I personally advance the auditors $750.00 in cash to start the Midwest Audit. We will not be able to know how they are coming along until [245] they file the report with the Court.

"I am glad to hear how the Diggs report started. I knew there was nothing it. However, I know that he can do nothing more or not as much as we can. We are still waiting for Judge Shinns decision, and will advise you the day it is made. I have the best Engineer I could find to make a report on the Mines and he will have it complete by Monday. I am very anxious to see it, as we will know just where we stand, and if it is alright in every way we will get together and make some money for ourselves. I think that we need Charley with us and please explain both situations to him, and that we will be on our way very soon. We should arrange to meet in Jackson, providing that the Mines are reported to be a very good thing. If they are not I have another deal that you will like. We must go to work for ourselves and there very quickly.

"Sincerely,

"JACK (signed)."

(Testimony of W. J. Morgan.)
And then in handwriting: "Please excuse my typewriting."

(By the Witness)

I signed the Tyler partnership agreement. I didn't personally own any stock. My wife's stock was transferred into my name during the trial. The boys seemed to—Mr. Shaw seemed to think that I ought to be put in a position where the men soliciting subscriptions to the committee could say that I held a certain amount of stock. Well, of course, [246] it being my name, I did hold it, but it was really my wife's stock. And that had been transferred back to her in December of 1933.

I have seen this card before. It is in Mr. Shaw's handwriting. On the reverse side of the card is my handwriting. I had a discussion with Mr. Shaw about the Tyler agreement and my becoming party to it before I affixed my signature thereto. That was in the Banks-Huntley Building. I think there were others there, but I don't recall who they were. Mr. Shaw owed me some money and I had been trying to get a settlement out of him for a long time, and finally when this Tyler mining proposition came up Mr. Shaw says, "Would you accept a settlement of 643 shares of preferred Monolith Stock?" and I think it was sixteen hundred and some-odd dollars in cash, a settlement with me.

I said, "Yes."

(Testimony of W. J. Morgan.)

"Well," he says, "would you put that into the Tyler mine if I hand it over to you?"

"Well," I says, "yes."

So he asked me to sign the Tyler agreement. Well, there were a lot of people signing up there that belonged to the committee that didn't think much of their stock at that time, and so I put my name on there with that understanding, and I got his card there at that time. (Examining document) That is the number of shares he proposed to give me. That is Mr. Shaw's handwriting. That is my handwriting on the [247] back, the memorandum.

(By Mr. Montgomery:) The handwriting on the front of both cards is Mr. Shaw's.

(The documents referred to were received in evidence and marked "Government's Exhibit No. 104.")

I made a trip to the Porteous mines in December 1933. Mr. and Mrs. Shaw and Mr. and Mrs. Tyler and myself went up there and inspected the properties. I made one trip to the McKisson mine. It was about two or three months after it was opened up. I think that was about the time that the Tyler agreement was signed. This letter on the stationery of W. J. Shaw, dated February 22, 1934—I received through the mails from Mr. Shaw.

(The document referred to was received in evidence and marked "Government's Exhibit No. 105.")

(Testimony of W. J. Morgan.)

Mr. Norcop:

"February 22, 1934.

"Dear W. J.

"I have just sent you a telegram and will rush this to you with enclosed check for $100.00 and you can give Charley $25 and tell him that we can arrange money matters on arrival. We have plenty to do from here on and not only look after some important matters for the stockholders but get in to a real business of our own and make up for the lost time that we have been losing. You will be surprised to see the work we have done on the mine that you did see. I won't tell you much for I want you to see for yourself for I know that no one can sell you *are* tell you an*d* thing about a Gold mine and that you must see for yourself. I [248] have a Special report from one of the best engineers in California, in fact have two reports, and they are fine. We will have our plant finished and operating in ninety days and should be making plenty of money. Mr. Tyler and Gilbert will meet you at the Hotel in Jackson at Noon tomorrow (Friday). The mine is only Eighteen miles from Jackson and a good highway. This should put you in here some time Saturday and please phone me on arrival. Tele-

(Testimony of W. J. Morgan.)

phone Malibu 26362. Will be waiting for your call.

"(Signed) Jack."

I neglect to say that the stationery was: "704 South Spring Street, Los Angeles." That is the Financial Center Building if my recollection serves me correctly.

(By the Witness)

On February 26, 1934, I had a conversation with Mr. Shaw. I recall that no one was present. I wouldn't say whether that was in the Banks-Huntley Building or the—it might have been in the Financial Center Building. Wherever we had our offices at that date.

I had been talking to Mr. Shaw about a settlement, and brought the matter up so often that finally he said to me, "Well, suppose I settle up with you and give you so much stock and so much money, that will equal so much, and that is about what I owe you. Would that be satisfactory, if I give you that, and would you turn that over and sign the Tyler agreement and put it in the Tyler mine?"

[249]

I said, "Yes."

We signed up those documents there, wrote that letter, and Mr. Shaw signed that card and I signed the Tyler subscription. The card reads "To W. J. Morgan. You can cancel your agreement with Tyler if I do not accept your settlement with me of date."

(Testimony of W. J. Morgan.)

That is the same date as the letter. The second card is in Mr. Shaw's handwriting. Reading: "J. Morgan, Cash 1607. Stocks 643."

(Copy of Tyler Agreement produced.)

(The document referred to was received and marked "Government's Exhibit No. 106 for identification.")

As to this letter dated June 10, 1936, on the stationery of W. J. Shaw & Company, addressed to W. J. Morgan, care of the Hotel Oakland, Oakland, California—I received that letter, on or shortly after the date it bears through the mails.

Mr. Norcop (reading from the letter):

"Business here, as you know, is so dull"——

"About the only thing we are waiting on, is for the McKisson Mine to get onto a dividend basis; so I have about decided it would be best to turn the offices over to him, and probably get a cheap office in Santa Monica for the summer months."

(The document referred to was received in evidence and marked "Government's Exhibit No. 107.") [250]

(Testimony of W. J. Morgan.)

GOVERNMENT'S EXHIBIT No. 107

"W. J. Shaw & Co.
Investments
634 South Spring Street
Los Angeles

"TRinity 9606
Established 1914
June 10, 1936"

"Mr. W. J. Morgan
c/o Oakland Hotel
Oakland, California

"Dear Mr. Morgan:

"Upon my return to the office Monday morning, I learned that you had hurriedly gone to Oakland, and I assume that it was in connection with the packing plant idea, which I think is a good one.

"I have had another talk with Mr. Burton and he is willing to take over the offices, as he has another receivership job that he is auditing; and by their paying part of the office expense, he will be able to take care of the whole load.

"Business here, as you know, is so dull—about the only thing we are waiting on, is for the McKisson Mine to get onto a dividend basis; so I have about decided it would be best to turn

(Testimony of W. J. Morgan.)

the offices over to him, and probably get a cheap office in Santa Monica for the Summer months. I don't seem to be improving in health, and in my opinion, I could run all the business through this cheap office in Santa Monica, and at the same time, recuperate so that I will be able to do some real constructive work in the Fall. From now on, the only thing left will be outside work—raising sufficient money to keep the situation in shape.

"I think I shall go ahead and do business with Burton, since it meets with your and Mr. Wikoff's approval. I had another talk with Wikoff and he thinks the idea is splendid.

"Syvertson informs me that the hearing of the demurrers in his suit has been put over for about three weeks.

"I don't know what your plans are—whether you have any other business here in Los Angeles or not. If you haven't, then with your co-operation stationed at Oakland, you could be close to the mine to check up on the situation, when as and if, it is necessary.

"Nash, at Watsonville, has a couple of parties who want to go to the mine, and also the Goulds of Oakland. We have written them that we expect to be there this week-end; and will go, if we receive word from them that they will meet us. If our plans materialize, will wire you and have you meet us in Jackson. In the event they cannot go this Saturday, they will probably be able to go next week.

(Testimony of W. J. Morgan.)

"With kindest regards to you and Mrs. Morgan,

Sincerely,

(Signed) W. J. Shaw.

WJS:S W. J. SHAW"

(By the Witness)

This carbon copy of a letter dated August 16, 1934, addressed to W. J. Shaw, 634 South Spring Street, Los Angeles, California, entitled "Dear Jack," and on the reverse side "W. J. Morgan," and below that a blank line, is a true and a carbon copy of a letter I addressed to Mr. Shaw on or about that date. I mailed it to him. After receiving the card on which Mr. Shaw wrote the statement that was read awhile ago, I withdrew from the Tyler agreement. I was never a stockholder in the Consolidated Mines of California. I was an officer; Executive vice-president. I had a conversation with Mr. Tyler regarding his constructing a mill on the McKisson property, after I had put my name on the Tyler agreement. I have talked with Mr. Shaw about Mr. Tyler's building the mill on that property. I don't recall just the particular occasion. There was talk about the mill on a good many different occasions. I talked to both Tyler and Shaw about that subject. I can say definitely that it was understood in the contract, and so understood among everybody there, that Mr. Tyler was to put the mill

(Testimony of W. J. Morgan.)

up at his own expense. That was part of his agreement. Mr. Shaw told me that Tyler would build that mill out of his own—out of the avails of the——

MARGARET GAUD

a witness for the Government, testified as follows: [251]

Direct Examination

I live at 329 North Kenmore Avenue, Los Angeles. I am a retired teacher. I was a stockholder in the Monolith Committee. I had 25 shares of the Monolith and 60 of the Midwest. I went into the suit. I put in with the rest of them. I paid 50 cents a share. I later became acquainted with the Consolidated Mines or the mining enterprise.

In December of 1934, Mr. Alexander came out to the house on three different occasions. When Mr. Alexander called, Miss Stearns was present. Mr. Alexander came alone. We had three different conversations. In the first conversation, Mr. Alexander spoke of what he thought that we all had agreed that the Monolith stock after the suit seemed quite valueless and that the men in the Stockholders Committee thought out this plan to help the people to gain back what they had lost on the Monolith if we would turn over our stock to them and take the stock of the Consolidated Mines. I think the

(Testimony of Margaret Gaud.)

first day of December that he came the first time, and then within a very few days again. During the second conversation, Miss Stearns and I were present. We said absolutely that we would have nothing to do with it because we didn't think much of gold mines as an investment. I again saw Mr. Alexander in December of 1934; just before Christmas. I keep a daily diary. It is right here in my book (indicating) Mr. Alexander was there first on December 1, 1934, and then on December 4, 1934, and again on December 22, 1934. Then [252] on December 26th we went down to the office to see Mr. Shaw. Up to December 26th, I had not yet transferred my cement stock over into the gold mining stock. On December 26, 1934, I had a conversation with Mr. Shaw. There was present just Miss Stearns and Mr. Shaw and I. The conversation was that of course we had attended the Monolith trial and had followed it right through and had gotten the idea because Mr. Coy Burnett was still left in charge of the company that the stock was not of much value and he spoke and gave us very glowing accounts of this new venture. Mr. Shaw gave me these glowing accounts of the mining venture. And he spoke—Mr. Alexander had spoken of the McKisson mine.

Mr. Shaw repeated that the Monolith stock was practically valueless, and that this mine had—he gave us very glowing reports of this mine and what might be expected from it, that we would gain back

(Testimony of Margaret Gaud.)

all that we had lost in the investment in the Monolith Company, that within a year there was no doubt at all that we would have dividends, that we would gain back all that we had put into the Monolith stock and probably very much more. I relied upon the statements of Mr. Shaw.

We knew Mr. Morgan simply as the—I believe he was the chairman of the Monolith stockholders committee, and we had quite a high opinion of both Mr. Morgan and Mr. Shaw. We thought they were men of ability and men of integrity. And Mr. Shaw repeated what Mr. Alexander had already told [253] us, that Mr. Morgan had turned over his Monolith stock and gone into this mining venture. I don't remember that he said very much about the gold ore at that visit, but he spoke of the—well, he spoke of it being valuable property. Mr. Shaw said they were to spend the money derived from the Monolith stock in developing the mining property. As to this letter on the Consolidated Mines of California addressed to Miss Margaret Gaud, Los Angeles, and signed by Frank S. Tyler, and dated July 1, 1937, —I received that through the United States mails.

I made an exchange of my stock in the Midwest and the Monolith for gold mining stocks in the Consolidated Mines. It was in October 1935 that we turned in the Midwest stock. As to the Monolith —Mr. Alexander came out to the house and got our stock on December 27th, the day after we talked with Mr. Shaw. I had an agreement with Mr. Shaw

(Testimony of Margaret Gaud.)

to make the transfer. I received 175 shares of the gold mining stock for my Monolith. I traded my Midwest in October 1935. I made that deal with Mr. Shaw. He was the only one to whom we talked about it. It was on October 3, 1935, that we went down to the office in response to a telephone call from Mr. Shaw. He told us at that time that the Midwest suit, which we had gone into, was very likely to drag along for several years probably and it was quite unlikely that we would ever recover anything through that suit, so we decided then to turn over the Midwest. I turned over 60 shares of Midwest [254] for which I received 60 shares of the Consolidated Mines.

Cross Examination

This memoranda is just copied from my book. I have my book here. This is a copy of what is in my book. I remember quite well what this man said and what the other man said, back in 1935. That is, I don't remember exactly the words that were said, but I remember the gist of the conversation. I have gone over these matters with the United States Attorneys here, several years ago. Recently, I just read over what we wrote—what we said at that time, several years ago. Several years ago, I talked to Mr. Hughes and Mr. Roger Kent. Roger Kent is in the office in San Francisco. I forget just what his office is. (Producing document) July 29, 1935, the 175 shares of Consolidated Mines of Cali-

(Testimony of Margaret Gaud.)

fornia were issued. I received those for the 25 shares of Monolith. It took about six months for my stock to get out here. As to what happened to them in the meantime—I don't remember that I inquired about it. We went into the office quite often, or occasionally, rather, to see Mr. Shaw and it seemed to me there was something about—well, I wouldn't dare say why we didn't receive it, but we had reasons. But he had reasons why we didn't. He seemed satisfactory to us. We still thought Mr. Shaw was a man of integrity. He told me about this stock, the Monolith—that it was practically valueless. No one else told me that except Mr. Alexander. We have found out since that it was [255] not valueless. Quite a number of men came to the house wanting to buy it from us at various times during those years, and also we noticed since then that the Midwest has paid dividends. I saw that in the Los Angeles Times. I believe it when it makes such statements as that.

ALBERTA E. STEARNS

a witness for the Government, testified as follows:

Direct Examination

I live at 329 North Kenmore. I am a retired teacher. I owned stock in the Monolith. 25 of the Monolith preferred and 90 of the Midwest. I do not still own my Monolith stock, or my Midwest. I

(Testimony of Alberta E. Stearns.)

transferred it to the Consolidated Mines of California—for stock in the Consolidated Mines of California. I was informed about the Consolidated Mines of California in December. I think it was the first day of December of '34 that Mr. Alexander called. Mr. Alexander came on the first day of December and again on the 4th, then on the 22nd; that was the third visit. I heard the testimony of Miss Gaud. I was present during the visits of Mr. Alexander to my home. I heard the same representations made that Miss Gaud testified to. I went with Miss Gaud down to the office on the 26th of December, and visited with Mr. Shaw. I don't think my testimony as to the interview with Mr. Shaw would be any different from what Miss Gaud testified to. I remember that he spoke of the mine and of the great advantage to us in the transfer of stock from the Monolith to [256] the Consolidated Mines, and that we would probably receive dividends within a year. I relied upon Mr. Shaw's statement. The Monolith preferred I transferred at that time. On the 26th of December, I transferred 25 shares of the Monolith preferred. I received 175 shares of gold mining stock. I did not trade my Midwest in on the 26th of December. I did not make that exchange until October of '35. I turned in 90 shares and received 90. I keep a daily diary.

As to Government's Exhibit 83 on the Consolidated Mines of California stationery, July 1, 1937, addressed to Mrs. Alberta E. Stearns, which should

(Testimony of Alberta E. Stearns.)

be "Miss", and at Los Angeles, California, and signed by Frank S. Tyler, I received that letter through the United States mails. And this envelope marked Los Angeles, California, July 3, 1937 is the envelope in which I received the letter.

Cross Examination

I have my diary with me. (Producing diary) There is this one (indicating). "Mr. Alexander called," and further on November 30th, Friday, '34: "Mr. Alexander out for exchange of Mon. stock." "Mon. stock," that is Monolith. The next one is on the 4th of '34. "Mr. Alexander called again for answer on gold mine proposition." And the next one is December 22nd. "Mr. Alexander here about the mine. M downtown." That means Miss Gaud was not at home at that time. And the 27th—26th and 27th. 26th: "Mr. Shaw office about Monolith stock transfer. Bought" [257]

Thursday: "Down to Mr. Shaw. Sold" "Turned over Monolith stock on the mining deal." That is December 27th. This was December 27th I turned in the 25 shares of Monolith and, of course, the gold mining stock came later. Here is one for the 11th day of November 1935 for 90 shares. The first certificate that was issued was called in because it lacked the notation of non-assessable. This stock was non-assessable and fully paid, fully voting. That wasn't on my first certificate. My first certificate is 175 shares. Then we returned that to the

(Testimony of Alberta E. Stearns.

office and—non-assessable, right here (indicating). Fully paid, full voting and non-assessable. These certificates were issued afterwards. The first certificates issued by the company were called in because they did not conform to all the rules of the Corporation Commissioner, I think and then these were new certificates, which were issued. My first certificates for 175 shares didn't have this typewritten memorandum nor did it have this fully paid, full voting and non-assessable on it. That is why that was exchanged.

I went frequently to the office to make inquiries about the progress that was being made at the mine, and also about the progress being made in the Midwest suit. I saw Mr. Shaw frequently, and talked with him. I may have said that I wasn't satisfied, that I was disappointed that we hadn't received dividends before that time. I think he encouraged us to think that the work was going ahead as well as could [258] be expected. I never went out to the mine myself.

There was only one stockholders' meeting that I attended. I believe it was in '39.

I never talked with Mr. Morgan. I saw him frequently in the office, but I never talked with him. I talked always with Mr. Shaw—once I think with Mr. Tyler, just simply asking for information about the progress being made.

Miss Gaud and I live together.

W. J. MORGAN

further testified as follows:

Cross Examination

Before I entered into this partnership agreement of Tyler's, Mr. Shaw owed me something over $6,000. It came about in this way: Mr. Shaw asked my wife to put her stock in my name. It was for the purpose of being able to say that Mr. Morgan held a certain amount of stock. If I was going to head the committee, he thought it policy to have me holding a certain amount of stock.

Well, the way to go into that was to have my wife's stock transferred into my name, and that made me hold a certain amount of the stock. That was done. I did not exactly know what I was doing. If I had, I don't think I would have done it because I woke up to the fact that it disfranchised me from having a right to receive directly from the committee any compensation.

After I found that out, I called Mr. Shaw's attention [259] to it.

"Oh," he said, "I hadn't thought of that, either, but," he said, "I see the position that you are in now." He said, "Well, I will tell you, W. J., I will fix that. I don't know what I am going to get out of it, but I am assuming a rather important position here of chief investigator and I think that that will be fairly well compensated by the judge, and whatever it is," he says, "I get out of it, I am going to split that 50-50 with you."

(Testimony of W. J. Morgan.)

Well, I let it go at that. I said nothing more about it, but just let it go at that.

Then after it was all over, why, nothing was offered me, and so forth, and there I had put in all those years' work, and so I—after Mr. Shaw got his money from the court—I thought it nothing more than proper that he keep his word. He got his money from Judge Shinn. He got $12,000 fixed by the judge as a reasonable compensation for all the work he had done in the committee.

He took that money without any protest, but it seems that he had made a $40,000 contract with the executive committee which, at the time, I didn't know anything about. I was not on the executive committee. I was never on it. I thought he owed me $6,000. And that is the $6,000 that I turned over for the mining stock. I didn't know what he was going to get. He didn't know himself. According to the statement that was made, what the judge would allow him, but [260] he assumed on account of the important work, collecting testimony and so forth, or rather data through sustaining the suit that it would probably be a substantial sum, and he said, "Whatever it is, well it is 50.50." I signed this Tyler agreement, I think it was along in February 1934. I think I was one of the first signers on there, if I remember right, that it was probably about the time the agreement was signed. There doesn't seem to be any dates set opposite the time that people signed here. There is only the date of

(Testimony of W. J. Morgan.)

the agreement. I don't know just how much later than that it was signed to be exact. I was paid $6,000. I got the money. I didn't approve of the $12,000. I had nothing to say about it. It was just an award of the court. If I wanted to consider the proposition from the standpoint of what actually happened subsequently, why, I would have instead of $6,000, I would have about $20,000 coming to me, because Mr. Shaw really got $40,000 out of the committee instead of $12,000.

I am not resentful against Mr. Shaw except where I feel I have a right to resent things that have happened. I never allow those things to embitter me. Mr. Shaw and I are on speaking terms. We have been on speaking terms all of the time I have been suing him. I had a suit on an accounting suit and we have always exchanged "How do you do's" when we meet and so forth. It is just a question of getting things straightened out, and I am not the judge in the matter and [261] so I passed it all up to the court to see whether he or I was right. I passed it up to the court to decide the accounting suit and I got a judgment for $34,478 against Mr. Shaw. That was the result of the accounting suit.

As to whether I was giving my time and money for nothing—some of the people may have made that statement. I don't think I told anybody that I had an agreement with Shaw that I was to get a 50 per cent cut on what he was getting as an

(Testimony of W. J. Morgan.)

investigator during that entire period that the allowance was made.

As to whether I signed an approval of the $12,000 that was to be paid to Shaw in the matter of the settlement—I will correct that there. I presume that some papers were offered to me to sign there in settling all that business up. I presume I did. (Examining document) That is my signature. That is all right. My memory was a little bit—— (Pause)

(Letter received in evidence.)

(This was a letter written by Haight & Triplett, attorneys for Monolith, and outlined the terms of settlement.)

That was handed to me. I know the contents. I read every line of it. This was the authority for Haight and Triplett to settle the lawsuit; and without it, he had to present this or something like it to the court on behalf of the committee before he would be allowed to settle the suit. Because the judgment had already been rendered.

I remember seeing here that at the end here, "The [262] defendant offers to pay into the Monolith Portland Cement Company the sum of $225,000 cash, out of which sum he agrees that the subscribers of funds to the Monolith shareholders committee, both Monolith and Midwest, shall be reimbursed their full 50 cents per share contribution, and out of which their attorneys' fees and costs of action shall be paid, including the payment of Ly-

(Testimony of W. J. Morgan.)

brand, Ross Bros. & Montgomery, the amount of its unpaid bill and the $12,000 payment to W. J. Shaw. That was done. I don't know whether Haight knew I was getting 50 per cent cut of that.

Mr. Shaw had made a contract with the executive committee to pay him $40,000 for representing them as chief investigator, and he collected all of that and $34,000 besides.

I knew nothing about the contract when it was made, but about three or four months afterwards I heard about it. In fact, I saw it, and then after the judgment was rendered for $820,000 it was put up to me to endorse it, and I thought, "Well, if we collect $840,000 from Burnett, why, I don't suppose that the $40,000 is so much out of the way, after all." But later on Mr. Shaw was insisting upon a settlement there with Burnett for $225,000 instead of $820,000, I thought that he should reduce that amount of that contract proportionately with what was coming out of it. That was put up as all that Mr. Burnett could raise under the circumstances, because he had to go through that depression like everybody else and was supposed to be very materially affected by it, [263] and that was given out by Haight & Triplett to me as all that Burnett could raise. They worked on me for some time there. I was reluctant to sign that settlement, and finally I wasn't getting anywhere and I finally signed that.

I signed up for $1,607 cash and 643 shares in the Tyler partnership agreement simply because that

(Testimony of W. J. Morgan.)

was what Mr. Shaw offered me. He says, "Suppose I turn over to you 643 shares of preferred stock and so much money. Would you settle with me and turn that over into the Tyler agreement?"

I said, "All right."

I don't know how he arrived at that 643. It was his figuring; not mine. That stock was supposed to represent about—well, it originally was $10 a share; that is what it was bought at. My wife had 640 shares of preferred stock in the Monolith. I don't know any more than the man in the moon why he made it 643. It was just his figure. He wrote it down there in his own handwriting on the card. That is evidence of that. I am sure I got that at that time, February 6, 1934, the time that is designated here. I didn't get it a year later. I don't recall that I advanced any moneys to the committee myself.

I think Mr. La Grange put up a little. Mr. Shaw, I think, borrowed a thousand dollars from Mr. Harding personally, and I suppose at that particular time that the committee got some of that money, because office rent had to be paid and some stationery got out, and all that sort of thing. [264] Mr. Shaw did advance moneys from time to time; some little money, to start off with. There were books of account kept, Mr. Harding was the bookkeeper. The committee books are, I suppose, in the hands of the court. We had the books when we were trying that case before Judge Gould down here, accounting case. Mr. Shaw occupied the position of—well,

(Testimony of W. J. Morgan.)

styled chief investigator with the committee. Later on, he got the title from some resolution that was passed by the executive committee of executive secretary. I should say that Mr. Shaw was the man that took the first steps in the organization of the committee. I helped organize it. I became a straw man, I think, more or less. All I could do for the time being there was to make a great big roar any time that I saw something was going wrong, and if it took effect, all right, and if it didn't why, I had to abide by the consequences. But, as a rule, it did have some weight, and I managed to pilot the thing through and we came out very successful in the end.

I approved a good many minutes of meetings that were held.

I never did resign as a member of the committee.

Government's Exhibit No. 102 bears no date. I don't think I find anything false in there. I got expenses, my hotel when I came down here. I got about a hundred dollars a month to pay hotel expenses while I was in Los Angeles up to the time I came down here when I had never drawn more than $50 a month. That was for the first year or so, in [265] fact, almost a year and a half. I drew $50 a month. I never drew any more. That is all I got from the committee direct, to my knowledge. (A receipt was produced) (The document referred to was passed to the witness.) I got that.

As to Exhibit 103. February 1, 1934: "As I have

(Testimony of W. J. Morgan.)

the best engineer I can find to make a report on the mines, and he will have it complete by Monday." I think at that time we only knew one engineer in the deal, and that was Mr. Chaney. Later on there was an engineer that used to do some work for the company by the name of Reed Sampson, but up to that time Sampson was brought in I think Chaney was the only engineer. Mr. Chaney set himself up as a mining engineer.

As to circular letters that were sent out to the stockholders—I signed a lot of them. Some of them, I didn't sign. [266]

BYRON E. ROWE

a witness for the Government, testified as follows:

Direct Examination

I am a miner, and have been for forty years. During most of that time I lived around Sonora, Tuolumne County. I live at the present time at Jamestown. That is four miles from Sonora, Tuolumne County. My hometown is about 50 miles from the McKisson Mine. It is over in Calaveras County.

The first time I went to the McKisson property was with Reed Sampson in 1936, the latter part of 1936. We spent several hours there. I took one

(Testimony of Byron E. Rowe.)

sample from the stope in the lower tunnel level. This map that I have in front of me was prepared in the latter part of '37 or the first of '38. That is when I sampled the property. This is the tracing that the original map was made on, and this other one is a print off of that.

(The map referred to was placed on the blackboard.)

This down here is the title. It is the McKisson Mine, West Point Mine District, Calaveras County, California, Brunton Survey, September 30, 1937, scale 1 inch equals 40 feet, by C. Martin, Sampling directed by Byron E. Rowe. I went over there. I wasn't there all of the time. Martin did the work. He did the surveying and the sampling under my direction. That map was made as a result of that sampling and of the survey. A Brunton survey is made by a little hand Brunton, Brunton transit, which most every engineer [267] probably owns one of them.

Up here is a plan of the two tunnels, looking down from the sky to the earth (indicating). That is the top tunnel. The mill tunnel up above. This is the ditch tunnel, the lower one. This line running here (indicating) is a crosscut, and these figures along here (indicating) indicate the results of sampling, the values obtained from assays made from cut samples. All the information contained from it is written out here opposite each line. This is

(Testimony of Byron E. Rowe.)

where the level is superimposed. That is the position of them looking from the top down. This here (indicating), they are spread apart so the sampling could be put down, but here is where they are superimposed. This colored section is the section through the mountain. This is superimposed here (indicating). That is the position of the level looking down (indicating). Here is where the levels are spread apart to show the assays. This lower diagram down below is where you would superimpose these two, one on the other; so you get a true picture, looking right straight through the earth. And this is turned up so you get a plane or section cut. You split the hill in two along the vein. Pointing to the mill tunnel, the upper tunnel, this section indicated there is a stope. You are going west, north being the top of the map. The first aperture entering the mill tunnel is a stope which is an elevation above the mill tunnel. It is a mined out opening. Along here (indicating) you come to another one of those [268] called a stope, and you come along and you come to a smaller one over here. Up to the extreme left of this map, the westerly end, there is an old-time tunnel from the early days. That is coming from the west and going east. That is a stope at the end of it. On the lower tunnel the ditch tunnel starts the portal out to the edge of the map, and this little dip here (indicating) is the ditch, where the flume carries the water through there. Coming in from east to west in this

(Testimony of Byron E. Rowe.)

lower tunnel we come a distance of approximately 480 feet. From the portal of the lower ditch tunnel coming in eight inches is 820 feet. In the lower end is a short stope there. That is 400 feet into the point that you have here, and you have what you call a raise that goes from the lower ditch tunnel. That goes clear through to the upper or mill tunnel. Proceeding on, we come in here—480 feet. Then we have another little stope. This area (indicating) is a stope tunnel. It is empty. I find 13½ inches there. The length of it, not from the entrance, but the length of it here is about four inches, 160 feet. That is the last stope. There is a winze here started. That is about the middle of this last stope, fifteen inches. A winze is a small shaft starting at the bottom of a level and going down. When I was there that was about six feet deep, maybe eight feet. The stopes are in a sort of yellow color, and the probable ore is colored in purple. These are sky blue. These violets or purples down below represents possible commercial ore. That is the pink. [269]

(The map referred to was marked "Government's Exhibit No. 108" for identification.)

I was not given any compensation for that first visit over there. I just visited to look the mine over. He wanted my opinion as to the mining methods. I visited the property several times.

(Testimony of Byron E. Rowe.)

In May 1937 I went over with Mr. Wikoff and Mr. Shaw, and possibly Mr. Tyler. At that time we saw a mill with five stamps running. The mill is out here at the portal tunnel (indicating). Possibly the lower floor maybe 30 feet below the ditch a five-stamp mill was operating.

After we went to the Mountain King Mine they wanted me to go ahead as consulting engineer. We just talked it over and I agreed that I would go ahead and act in that capacity. Mr. Wikoff, the president, gave me a letter authorizing me to go ahead and act in that capacity. But I never acted, for the mere reason that I had all I could do where I was at to attend to my own work. I went up there several times, accommodation trips, for Mr. Shaw, when he would call me up and wanted me to go up and check up and see what was going on up there.

Mr. Norcop: This letter, Exhibit 21, is on the Consolidated Mines of California stationery and is one of those seven, your Honor, that are set out in the indictment. There are seven different copies with seven different addresses. It is dated July 1, 1937. I am reading from that letter, the [270] third paragraph, which reads as follows:

> "Mr. Byron E. Rowe, who has successfully operated mines in this section for over 30 years, has been made 'Assistant to the President' and put in full charge of directing policy and methods of mining and development."

(Testimony of Byron E. Rowe.)

(By the Witness) I did consent to act as assistant to the president at that time. He gave me a letter authorizing me to go ahead and act. I haven't got it now. I think I returned it back to Mr. Wikoff. I never acted under it.

As to a letter on the stationery of W. J. Shaw & Company, dated December 20, 1937, and addressed to Byron E. Rowe, care of the Mountain King Mine, Copperopolis, Calaveras County, California, I received that letter through the United States mails about that date, or shortly afterwards.

(The document referred to was received in evidence and marked "Government's Exhibit No. 109.")

Mr. Norcop:

"December 20, 1937.

"Mr. Byron E. Rowe,
"C/o Mountain King Mine,
"Copperopolis, Calaveras County, California.

"Dear Byron:

"Jack McCarty arrived this morning, and as a result of the conversation I had with you last [271] night, I came to the office this morning for the first time in many months feeling that the McKisson Mine will now be in good hands since you have definitely decided to take entire charge. I want you to know, Byron, how we appreciate this, and if you can't make a go

(Testimony of Byron E. Rowe.)

of it, I do not think anyone else can. Ty is supposed to leave tonight and will carry out your instructions. Colman O'Shea will be asked to report to the office immediately, and you will be advised when he leaves. I realize that you are more or less handicapped, but I also realize that you act quickly, and the McKisson Mine should be going in a very short time. If you think you should close down over Christmas that is your business. In fact you are going to be backed up in this mill the same as you have in the Mountain King. I suggest that you keep track of your mileage and all expenses in connection with the McKisson, so that we can take care of that separately, and the consideration to you for the supervision that you give it will be discussed upon my return which I expect will be this week.

"You may remember the mill man Danielson, who first gave us information indirectly that developed in the present investigation regarding O'Shea. I understand he is capable, and certainly must be [272] honest from the information he gave out.

"Jack is leaving here tomorrow night, and maybe I will come with him, and the payroll will be delivered to you by him Wednesday, as I do not want to take any chances of the mail being delayed during the holidays. Pur-

(Testimony of Byron E. Rowe.)

suant to the understanding with the California Liquidating Company, check was mailed Saturday for $250. Within the next few days I will have some information regarding the sale of the California Standard Mill. The Diesel Mechanic and his son whom I spoke to you about are available to come on request.

"Again assuring you of full cooperation, and with best wishes, I remain

"Sincerely yours,

"Jack (signed)

"W. J. Shaw

"WJS/G"

And this stationery has a rubber stamp on it, giving the Santa Monica address and telephone number, and is dated December 20, 1937.

(By the Witness) "Ty" referred to in the first paragraph was Tyler, and Colman O'Shea was the superintendent at the mine. The next to the last paragraph refers to the Mountain King. Then he goes back here about the Diesel; that refers again back to the McKisson. Danielson was an employee [273] of the Consolidated Mines of California, at the McKisson property.

The map is dated December 30, 1937. That was about the time the sampling was going on. The lower tunnel looked better to me than the upper works did, and that is why I recommended that they

(Testimony of Byron E. Rowe.)

spend $5,000 there and go ahead and sink a winze at the rate of $5,000 a month, because I thought the lower tunnel showed more evidence of more than the upper did. I wrote a letter on that of which one of those is a copy of my findings there as to what I wanted to do.

I don't know if it was a good property. You had to sink to find out. It warranted a little further money spent on it to find out the answer one way or the other, either that or abandon it; that was my recommendation. If it has the earmarks that it might win out, it would be better to spend a few more dollars to save it. The condition there warranted spending $5,000. That is as far as I would go on it, five or six thousand dollars. I wrote the letter, and that was all; that was my recommendation.

(The document referred to was received in evidence and marked "Government's Exhibit No. 110.")

Mr. Norcop:

"Mt. King Mine
"Copperopolis, California
"Jan. 18, 1938. [274]

"Mr. F. S. Tyler
"506 Bay Cities Bldg.
"Santa Monica, Calif.

"Dear Tye:

"Your letter under date of January 15 arrived yesterday. Jack Shaw delivered the check

(Testimony of Byron E. Rowe.)

for $150.00 for trustee account. We are asking that you send a duplicate copy of all invoices to us—that is if you have no duplicate, you should have an exact copy typed of the invoice and sent to us. As you will notice, you receive invoices substantiating all amounts paid out from trustee account.

"There is nothing doing at McKisson. The watchman you put in is still in charge. I paid all the men off on sampling job, also the watchman for Dec. Mo. He has 15 days now due in Jan. Month. I will need $1000.00 to start up on and figure it will take about $5000.00 to prove the thing up with. The program will be to start with 7 men to sink a winze and extend a X-cut on the Ditch Adit. My conclusion after making a study of the situation is that the Ditch Adit has improved over the Mill Adit 100%, and indications are that a much stronger vein and better values are coming in with depth. There is no commercial [275] ore available in any of the development work done to date. However, I figure a development program can be carried on and enough ore will come from this work together with a small amount of ore which can be recovered from the old levels, to about make an even break while the development work is being carried on. That is, it will not take more than $5,000.00 of new money to prove the mine up as a producer or failure. As

(Testimony of Byron E. Rowe.)

I stated, it will be necessary to have $1000.00 to start work with. After that may need the $4000.00 balance or may not call for any more money, but as you understand, no outstanding accounts are to be paid out of this estimate.

"I feel that if I am to have anything to do with the management, it is to be managed from this and not from the Santa Monica Office as the Mt. King is being handled.

"Chancellor is available for the McKisson at any time you get ready to move there. You had better mail Schoy's check direct to him. The roads are in such shape at present that everyone has to walk down to the McKisson from the top of hill near the school house. Don't make any McKisson checks out to me. Make them to Chancellor as trustee." [276]

(By the Witness) Chancellor was the foreman of the Mountain King Mine. Davidson was the other man. Chancellor was the man I intended to put up there in charge of the McKisson Mine if we went ahead with the program. I turned over some funds to him and started him in. He made two or three trips there, but he never went to the Mountain King Mine. He only went there on one or two trips.

There was $500 sent up there in response to this letter. I received $810 all together. I have furnished an accounting of all that money. $75 was paid to

(Testimony of Byron E. Rowe.)

me for sampling, then $25 for some other expenses which is named there. Other than that the money was spent for the watchman, and there was a little to be done there. The property wasn't operated by me during that time.

(Examining document) This letter was received by me through the mails.

(The document referred to was received in evidence and marked "Government's Exhibit No. 111.")

Mr. Norcop: It is on the stationery of the company at Santa Monica, addressed to Byron E. Rowe, dated July 15, 1938:

"Dear Mr. Rowe:

"This will be your authority to take complete charge of the operations at the McKisson Mine, for the Consolidated Mines of California.

"Very truly yours, [277]

"Consolidated Mines of California

"Frank S. Tyler (signed)

"Secretary-Treasurer."

(By the Witness) I took complete charge of the operations. That was for the sampling. That is when he sent up the $500 to go ahead instead of the $1,000. I wanted an authorization. I put two men on for three days, and I understood that they had compensation insurance and I checked up and found

(Testimony of Byron E. Rowe.)

out that they didn't, and then I laid the two men off. That was all there was to it. The rest were paid off for the watchman. The sum total of all the operations I did on the mine was two days. Repairing the engine, or starting to repair the engine.

As to this letter on the stationery of another company, addressed to Frank S. Tyler, it is signed by me. I sent it down with a check to balance the account for $29.69, and some time later he returned the check with the letter. This is the letter that I wrote him.

I recognize Mr. Hughes sitting here in the court-room. He visited the Mountain King Mine and also me in Jamestown. After he had been there, I had a conversation with Mr. Shaw pertaining to the McKisson Mine. I don't think anybody else was present. That is some time in the latter part of '39. It was several months after Mr. Hughes was up there. The only conversation was that he asked me if the S. E. C. boys had been around, and I said, "Yes." He said, "What did they [278] want to know?" I said, "They wanted to know what I had to do with the McKisson Mine, and I told them that I never had anything to do with it, only make a map of it and sample it, and was going to take charge of it and go ahead with it." Then he asked me about the map, and I said, "I gave them the map and they took it with them." And he

(Testimony of Byron E. Rowe.)

said, "Why, that is dynamite for them to get that map."

Cross Examination

That is one of his favorite expressions, dynamite. He says dynamite a lot.

(The map referred to was received in evidence and marked "Government's Exhibit No. 108.")

I have been a minor for 40 years. As to this letter of July 1, 1937, "Mr. Byron E. Rowe, who has successfully operated mines in this section for over 30 years," that is true on that date.

"—has been made assistant to the president." That was true.

"—and has been put in full charge of directing policy and methods of mining and development."

I agreed with Wikoff and Mr. Shaw; and Mr. Tyler was present. Mr. O'Shea was put in charge of operating the mine. I don't know when he came. I went to the mine when he wasn't there on December 17th, I think. I looked for him for two days. When I found him he was getting ready to eat. I think he had about 27 men on the payroll. Of course, they [279] weren't all working at the same time, but there was that many on the payroll. Mr. Tyler came up there and paid them off. Under the circumstances he was working under, he shouldn't have had but very few. I did not see those men on the property. I didn't go up there when he shut

(Testimony of Byron E. Rowe.)

down. Mr. Tyler went up with a man by the name of Mr. Bruner. I was not there when they wrote the checks to pay off everybody.

I think that map is correct. This stope up here, No. 1 on the east side—that tunnel, I think that is what they call the mill tunnel. There was an old tunnel that had been coming from the west. That is the top tunnel, and then the second tunnel down is the mill tunnel, and this is the lower tunnel, the lower tunnel is the ditch tunnel. The tunnels were all open at the time of the sampling. You could go any place.

I went through and took a few check samples; took one in here (indicating) and took one in here (indicating), and I think I took four or five check samples on Mr. Martin's work. This thing in here (indicating) is a sub-level; that is the level that runs between this level (indicating) and this one (indicating). That is a sub-level. That doesn't go out on to the open air, just in where the ore body was. I did not make any recommendations with regard to Mr. O'Shea. At the time I made that map and the time I made my sampling I was satisfied to make the recommendation to spend about $6,000. I got $500; that is all. The other $310 was for [280] the sampling, but the $500 was to start the operation.

Redirect Examination

My recommendations as to the continuing of work and spending of $5,000 are the same as are in my

letter here. There was no ore above the level and the only place to prove it was below the level. There was no ore in sight then.

CHARLES M. HERON

a witness for the Government, testified as follows:

Direct Examination

I am a mining engineer. I have been so engaged thirty years. I graduated from the College of Mines at the University of California; spent five years in Mexico doing the general work around a mine that a young engineer is put through. I worked as an assayer, surveyor, geologist, mine sampler, cyanide foreman, smelting house foreman, underground foreman, and toward the end of that time I was sent out frequently to make mine examinations of properties that were offered to the company for purchase. I have been doing that type of work ever since more or less continuously. I have been a consulting engineer eight years. I have had experience in the mother lode country. My first mining job while I was still in college was at the Kennedy Mine, which is at Jackson, and I have been in the mother lode country very [281] frequently on mine examinations.

I made a visit to this McKisson Mine in the month of May of this year. May 12th was the day I

(Testimony of Charles M. Heron.)

arrived. I was there four days. On the first day, May 12th, I went through the workings that were open, rather outlined my ideas for making the examination. The first day I didn't take any samples. I returned the following day. On that day I found a man about a mile from the mine who went with me to do the labor of sampling. The first thing I did was to make a Brunton survey of the lower level to as far in as I could. I think I was given that map after I returned from that examination. I think I was given and had with me one of the maps which was made by Mr. Sampson. When I went into the mine to commence my sampling I had just the one man assisting me.

I am referring to the report which I submitted describing my examination, made after I returned, from notes that I took at the time I was inspecting it. 25 samples were taken in all at 10-foot intervals. As to my method of cutting a sample in a mine, I usually make parallel markings across the vein that I am sampling, and then instruct the man to cut samples to a uniform depth of about ¾ of an inch which makes, if that is absolutely followed, just as perfect a sample as you can get. So that I get the cross section of the vein at a thickness of about ¾ of an inch. I had the sampling done in that fashion on this occasion. I watched [282] all samples taken, caught the samples myself. This man did the labor. Then I had them assayed at

(Testimony of Charles M. Heron.)

Smith-Emery in Los Angeles. I got the results back.

(Examining report) The ditch tunnel is caved and blocked at a point 610 feet from the portal. The mill tunnel was caved and blocked at the point where you come into a cross-cut and then come to a stope—this stope (indicating)—and it was blocked and caved at that point, blocked completely full.

As to that upper level on the other side, that goes from the west to the east. I saw the portal of it. That was caved too. This point that I did proceed in the lower tunnel was beyond the raise that connects the ditch tunnel with the mill tunnel. I tried to go up that raise from the ditch tunnel to the mill tunnel. The ladder was quite rotten, it is affected by dry rot. There was apparently no ventilation through there. I tried to go up the ladder. I went up at least one length, which was 10 feet, and started up the next length, and the first rung came out in my hands. I could see that I wasn't going to make it, so I backed down. As I went down I think two rungs broke with me. I brought along one so you could see the condition of it.

After sampling and surveying I think I was there two and a half days. Then I returned to my office in Los Angeles. After I received the returns from the assays I prepared the report and I prepared a map. I have the ori- [283] ginal. The

(Testimony of Charles M. Heron.)

tracing is with it. That is the original tracing. The copy I am handing you is a true copy of the original tracing.

(The document referred to was received in evidence and marked "Government's Exhibit No. 112.")

Referring to my map, I am looking west. This is north. This is on a horizontal plane. I am looking at the sky from the center of the earth. The portal is here, and comes in through here to this point (indicating); it cuts the vein at this point. From there to here it was open. It was caved at this point (indicating); this cross hatching indicates timbering. At one place I did get a sample in there (indicating). I can find the corresponding place on this cross-section of Mr. Rowe's map. I drew this at a different scale from this so I could show a little more plainly the quartz. It is a very spotty, erratic sort of material. The quartz is quite narrow, not at all continuous, so I drew it a little larger to show the quartz in that. That corresponds to Mr. Rowe's map going into about that point (indicating).

I am referring to Exhibit No. 108. The beginning of the stope here on Mr. Rowe's map corresponds to what I have shown here as open stope (indicating). I was able to sample the top of that, which gave me a check on Mr. Rowe's sampling. The samples are taken at 10-foot intervals. I show my number, the width in inches, the ounces in gold,

(Testimony of Charles M. Heron.)

and the value at $35 per ounce. No. 1 was the first sample I [284] took. It was six inches wide. I cut across six inches of quartz on either side, which was a granodiorite,—country rock. It is hard and barren. There is no particular point in taking any additional width there, although in mining you have to mine to 30 inches, so that six inches would be diluted by this additional 24 inches of barren ground.

The assay is .03 gold, which is $1.05. I took that knowing that it would be low grade, but I simply wanted to show the values for the whole distance that was open.

On the other map there are one or two good assays shown on the floor of the drift and not on the roof, which is rather a bad system of sampling because you are very apt to salt yourself without intending to do so. But at that particular point I got $8.75 about that same point. My sample there was 8 inches, which assayed .25 ounces of gold, giving a value of $8.75. That is one of the best assays I got, incidentally. That is based on a ton. The best assay I got in all my samples was just beside the shaft. That was only three inches but it ran .35, which is $11.33. per ton. It is practically worthless because you have to mine to a width of at least 30 inches—it dilutes that $11 so that it isn't any good at all when it comes to mining. That is the highest assay I got. I got one here that was $11.90, just at this one spot (indicating). That was 8 inches wide.

(Testimony of Charles M. Heron.)

It assayed .34, or $11.90 per ton. The point you are pointing to now on my diagram is a cross-cut. It was driven [285] out a ways from the vein apparently in search for another vein. That shows on Mr. Rowe's map. I examined that cross-cut. There was not any quartz in there. There was nothing of any interest in there at all. His map shows the same.

This diagram here opposite where the cross-cut starts is the raise, which is shown on Mr. Rowe's map as connecting with the lower tunnel, that is this connection from one level to another (indicating). I got to about that point when the run broke. I didn't see the place where the winze was commenced on Mr. Rowe's map. There is where the cave is, so that Mr. Rowe's winze would be out relatively in that position, about six inches to the left.

The only thing I was able to check was this: His samples along the top of the stope, and I can give you the comparative results of that sampling. The only opportunity for checking the Martin assay map is the group of assays taken just east of the raise on the ditch tunnel. Here Martin's map shows 14 samples over a length of 50 feet. These give a weighted average of $2.34 for 8.8 inches in width; reduced to a stoping width of 30 inches, gives an average value of $0.69 per ton. For a length of 70 feet, which includes the above

(Testimony of Charles M. Heron.)

50 feet, I took samples every 10 feet. These eight samples gave a weighted average of $1.88 for 8.5 inches. Reduced to a 30-inch stoping width, this gives an assay of 53 cents per ton. That is 53 cents against 69 cents, which is a fairly good check. [286]

I have had experience in operating mines and mills. I don't think I have ever operated that type of thing as I found in the McKisson mine. I made an estimate of what it would cost for mining per ton. I feel that it would be impossible, assuming that you got a continuous occurrence of ore of these narrow widths, I doubt if you could operate or produce for less than $11 per ton. That $11 is made up of the $3.00 mining costs, $2.25 milling costs, $5.00 development costs, and 75 cents general expense. General expense would include overhead, marketing concentrates, taxes. The ore must run over $11 to make a profit. That wouldn't include office expense away from the mine.

I was able to take Mr. Rowe's map and make an analysis from it. I was forced to do that. I considered it an excellent map and I drew my conclusions from what I saw there. I felt that there was absolutely no ore encountered. There may have been spots, and if there had been any continuity of that type of stuff, it might have been considered ore, but occurring as it did in scattered spots, it couldn't be considered ore. In other words, it was rather a

(Testimony of Charles M. Heron.)

poor prospect I would say. That would be my verdict on the whole McKisson property.

I did not find any samples containing free gold. I found some rather scattered sulphides,—iron sulphides, pyrites. I would not consider that property would justify the expenditure of $80,000. (Objection was overruled) [287]

I looked through the mill. When I examined it, it was a 10 stamp mill. The track comes out from the ditch tunnel and goes over a bin with an iron grating, which is called a grizzly. It is dumped on there and the fines go through to the bin and the coarser stuff is broken with sledge hammers until it will go through.

I don't remember fully the plan of the mill. Grizzly and bin at the track level of the ditch tunnel. Then a six-inch crusher which crushes the ore to about ¾ of an inch maximum size, and goes on to a belt feeder, which there are two feeders. One is what is known as the Champion type feeder and the other is a belt feeder. One feeds through one set of five stamps and the other through the other. There are 10 stamps. Then amalgamation plates, tables, three Denver sub flotation cells.

I found concentrates left in the concentrate bins below the flotation cells. I took samples. I think there may have been a ton or a ton and a half of concentrates left there. Those concentrates ran 2.6 ounces of gold or $91.70 at the present price of gold.

(Testimony of Charles M. Heron.)

There was not any material to cut from at the mill heads. I was able to arrive at a figure of how much tonnage material had been run through the mill. According to the data collected by the Securities and Exchange Commission, the total tonnage milled during the entire Consolidated operation was 3424 tons of ore. I got this data from data which the [288] Securities and Exchange Commission had. I believe they also showed me reports from the mint at San Francisco which have been furnished to them on this mine. I believe there is a letter from the mint which shows it.

Cross Examination

There were letters from the mint which gave us detail. I also saw a collection of settlement sheets which were authentic, I am sure. 3424 tons of ore which averaged $10.48 per ton, according to the figures I have, was milled. I drew my conclusions as I always do. I have to get a certain amount of data.

I have shown only a portion of one tunnel unfortunately. I did not take samples from the rest of the tunnel. I couldn't get into it. I did not take any samples in the sub level (indicating). I did not go into the mill tunnel. That was blocked almost at the portal. The top tunnel was also blocked. The samples I took were from a portion of the ditch tunnel.

(Testimony of Charles M. Heron.)

As to how many feet of tunnel all told are there, those measurements were taken from Mr. Rowe's map, because I was unable to measure them myself. There is a total of 2535 feet, including the raise and the cross-cuts. I examined 370 feet. I discovered no free gold. I wouldn't say that there was no free gold, never has been.

I had the Sampson map. I have it with me. Mr. Sampson is an associate engineer, I think they call him, of the State Division of Mines. He is in that position now. I am doing [289] consulting work independently, not for the S. E. C., for the United States Attorney in this case. I am not a regular employee of the S. E. C. This is one of the things that I consulted in the matter.

There are some very interesting things about this map. There are indicated on the lower level—I would say 18 to 20 assays which were apparently taken in the floor of the drift. I think they were self-salted. I think they were without question, because most of the good assays shown on that map were from those. That is my interpretation of that map. I wouldn't figure that Mr. Sampson would do that. He was not relying on somebody else. I think Mr. Sampson's sampling was done overhead. I think those samples that were taken on the floor of the drift were taken by Mr. Gilbert. I studied a tabulation of Mr. Sampson's shown in one of Mr. Sampson's reports and he showed with an asterisk the samples which were taken by Gilbert.

(Testimony of Charles M. Heron.)

Of the tabulated list of 76 assays in Sampson's report, March 30, 1935, 21 were taken by L. D. Gilbert. The weighted average of the 76 samples is: Width, 13.8 inches; assays, 289; the weighted average of the 21 samples taken by Gilbert is: Width, 16 inches; assays, 6973. The weighted average of the 55 samples, excluding Gilbert, 13 inches of $9.61, which reduced to a stoping width means about $3.00 ore. That isn't of much account. I think that Mr. Gilbert was not a mining engineer. He wasn't an experienced man. [290]

Mr. Sampson's results were not so far different from ours. That is, "from ours" I refer to Mr. Rowe, whose results checked mine very carefully. I feel perfectly sure he salted himself unintentionally. A person relying on his judgment may have been misled, just as I think he was misled honestly in adopting the wrong method.

The thing that struck me when I first studied this map was in one part of that lower level he shows a $600 assay for a width of 10 inches. Now around that there is almost nothing of any interest. It shows to me very plainly that that $600 assay means absolutely nothing. He has simply salted himself. If those values were disseminated uniformly through that material, the other samples would show something. If he had gone back and checked that sample I feel sure he would have gotten nothing, or $6.00 or $7.00. This map is not encouraging to me. I have to interpret things from

(Testimony of Charles M. Heron.)

my past experience. At the present time in the state of science and mind it is possible to form an accurate opinion as to the quantity of ore by the sampling method. You can't determine by the ore the quantity that may be lying behind it. You have to judge by what you can see. I think that the data you get at any horizon, whether it is surface or 50 feet or a hundred feet, is all valuable to you in judging the peculiarities of your ore. I don't consider it ultimately a guess. People have been paying me to do that sort of work for 30 years. My judgment has not always proved accurate. I have made mis- [291] takes. I feel that my work is worth the effort or worth the money.

I have had to give an opinion on mines that I couldn't get into at all. I have gotten volumes of data and have had to draw my conclusions from other data than that prepared by myself. In the mill is an 800 cubic foot compressor. There is a gas engine for driving the compressor, a 25-horsepower V-type Fairbanks-Morse gas engine. There is just the one. I have bought those Fairbanks-Morse engines, but I don't remember offhand what they cost.

Then there was another engine for driving the compressor. Apparently that is what they had for running the mill, as far as I could see.

(Map offered)

(The document referred to was received in evidence and marked "Defendant's Exhibit G.")

(Testimony of Charles M. Heron.)

I examined reports by Mr. Chaney. I think Chaney's report was rather optimistic. It didn't give a favorable impression to me. I think it was supposed to be favorable but my interpretation of the data that he submitted wouldn't have led to the same conclusion.

To a man who was not a scientist, merely a business man who employed Chaney on the basis of his reputation as a minnig engineer, and reads that report and doesn't have the critical outlook as a scientist has, I think it would give a fairly favorable impression that it is a good prospect for [292] a mine that warranted then some expenditure of money.

Redirect Examination

As to that total tonnage that went through the mill, according to the data furnished me that I considered reliable, was 3424 tons and was $10.48 per ton mill heads. On the extraction it was $8.38. The total gross value of the heads was $35,883.52, with a total gross recovery of $28,705.91.

(Questions by Juror Schumacher)

There comes a certain point when negative results seem to me should be fairly conclusive. At 2300 feet, or whatever the figure is, that is a lot of work not to have gotten anything more encouraging. There comes a point when it is logical and sensible to stop. To me there wasn't anything in that work

(Testimony of Charles M. Heron.)
that would lead me to expect to find a mine with any additional expenditure.

They have tried. There is considerable depth to that lower tunnel, not a great depth, but some. I had to draw my conclusions from what is on this map, which I feel is quite accurate.

(Government rests subject to putting on one witness.)

Documents made up by Mr. Jacobson from Black Book are offered.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 71.")

(Copy of Porteous Agreement offered) [293]

(The document referred to was received in evidence and marked "Government's Exhibit No. 106.")

(The following proceedings were had outside the presence of the jury:)

The Court: All right. Proceed.

Mr. Montgomery: I desire to move to dismiss the indictment on the ground that no scheme or artifice has been shown.

Taking Count No. 1, I make a separate motion to dismiss Count No. 1, which deals with Garfield Voget, on the ground that it is barred by the statute of limitations. The certificate that was issued to Voget was No. 681 on March 28, 1936, and 691 and 696, showing 600 shares and 140 shares. One of

(Testimony of Charles M. Heron.)

those certificates was on March 24, 1936. They are not within the three-year period.

Then I make a separate motion to dismiss Count No. 2 on the same grounds, the statute of limitations, for certificate No. 362 for 1,000 shares having been issued on November 1, 1935.

I make a separate motion as to Count No. 3, John W. and John Wesley Cline, certificate issued November 4, 1935, the statute of limitations having run.

Likewise Count No. 4, C. E. Seegar—there is no testi- [294] mony introduced at all as to Seegar, as I recall it.

Mr. Norcop: You stipulated that the letter had been received by her, and we proved that it was mailed.

Mr. Montgomery: There is no testimony of any representations having been made as to her.

Moreover, certificate No. 308 for 654 shares was issued on October 3, 1935, and the statute of limitations is run.

A further motion as to Count No. 5, William and Julia A. Schumacher of Eugene, Oregon, on the same ground, that the statute of limitations has run. Certificate No. 684 was issued on March 17, 1936.

As to Count No. 6, I move to dismiss with reference to Augustina and Lillian B. Gardner on the ground that the statute of limitations has run, the date being March 23, 1936, certificate No. 688.

A similar motion as to Count No. 7, Mrs. Grace

(Testimony of Charles M. Heron.)

Hayes; the statute of limitations has run. The latest date there is April 26, 1936, certificate No. 709. Moreover, Mrs. Grace Hayes shows to have had her stock issue approved by the Corporation Commissioner in the issuance of the stock under Permit No. 3.

As to Count No. 8, I move to dismiss with regard to Patrick F. Murphy on the ground that the statute of limitations has run, February 19, 1936, certificate 597 for 21 shares was issued. Moreover, on the further ground that the matter was passed upon by the Corporation Commissioner [295] authorizing the issuance to Murphy.

With respect to Marie M. D. Craig, the latest dates there are 2-15-36 and 2-1-36. Her stock was also authorized by the Corporation Commissioner in Permit No. 3, and I move to dismiss as being barred by the statute of limitations.

The 10th count, as to Mr. and Mrs. F. E. Dodson, the date there is February 15, 1936, for certificate 635, and this was authorized by the Corporation Commissioner, and I move to dismiss on the ground that the statute of limitations has run.

Count No. 11, as to Alberta E. Stearns, the two dates there are July 29, 1935, certificate 156 for 175 shares, and February 1, 1935, 390 shares, and February 15, 1936, 175 shares, and some shares were authorized by the Corporation Commissioner. I haven't the data on that. I move to dismiss that as barred by the statute of limitations.

(Testimony of Charles M. Heron.)

Then we have Mr. James Cruz. I think the motion perhaps should be reserved as to Cruz. He has not testified as yet. However, I might make it at this time on the ground that it is barred by the statute of limitations. The certificate was 699 for 500 shares issued April 13, 1936, and this was one of the matters that the Corporation Commissioner passed upon.

As to Margaret Gaud, Count No. 13, the last date there is February 15, 1936, certificate No. 546. The Corporation [296] Commissioner authorized issuance of stock to her, and I move to dismiss on the ground that the statute of limitations has run.

The 14th count is under a different statute. However, certificate No. 732 was issued on December 14, 1936, and I move to dismiss this count as barred by the statute of limitations, and on the further ground that no registration certificate was required for the sale or exchange of this particular cement stock for the mining stock, so I put that on two grounds.

As to Count No. 15, the certificate was issued on the 13th day of May 1937 here as to 30 shares and, as I understand, the statute of limitations is three years. This would come within the three-year period. I move to dismiss on the ground that, first, no fraud has been shown. The Corporation Commissioner authorized the issuance of 123 shares on July 29, 1935, and then another certificate was issued later for another 30 shares, as was explained in the evidence. I move to dismiss on the ground that it is

(Testimony of Charles M. Heron.)

not required to be registered under the law—I mean, no registration certificate is required.

The Court: What is the basis for that? Was it personally owned stock?

Mr. Montgomery: Personally owned stock, and it comes within the exception also as to the selling within the state by a resident of the state. [297]

The Court: Well, it is the use of the mails. It doesn't have to be——

Mr. Montgomery (Interrupting): But the law itself has an exception in there.

The Court: What is that?

Mr. Montgomery: The law itself has an exception there.

Mr. Montgomery: Mr. Tyler, in exchanging his stock and obtaining this in exchange, was not acting as an issuer for an underwriting as a party that is required to file a certificate—I mean, to register it.

Mr. Montgomery: May I just, for the purpose of the record, include this Count No. 16, which is another one of those three certificates issued without filing a registration.

The Court: Yes.

Mr. Montgomery: I make the same motion as to that.

The Court: All right.

Mr. Montgomery: Of course, that was issued within the statute of limitations, but on the other grounds I will make that motion.

(Testimony of Charles M. Heron.)

The Court: All right.

Mr. Norcop: I have read your memorandum on 14, 15 and 16. I am pretty well satisfied with those. The only doubt there is in my mind is the one I have indicated.

The Court: The motion to dismiss will be denied as to [298] all of the counts as to which the motion was made.

No exception was taken to this ruling at the time, nor was it renewed at the end of the entire testimony, or at any other subsequent time during the trial.

No motion to strike any portion of the testimony, as to which a ruling was made, was made by the defendant at the conclusion of the Government's testimony, or at any subsequent time during the trial.

EDNA SHAW

a witness for the defendant, testified as follows:

Direct Examination

William Jackson Shaw was my husband. We are divorced. I obtained my final decree last April. I haven't lived with Mr. Shaw since the summer of 1939.

I owned some stock in the Monolith. I don't recall how much I owned. I owned some preferred

(Testimony of Edna Shaw.)

stock and some common. I don't know how much of either though.

I turned the stock over to Mr. Shaw to advance to the Consolidated Mines, to the McKisson Mine, and I got stock in the Mine.

The stock ledger shows on February 15th, certificate 661 for 2,828 and that was afterwards cancelled and certificate 678 for 2,828 was issued. That is the amount of stock that I obtained in the mines.

Mr. Gilbert wrote a letter to Mr. Shaw telling him that he had this very valuable property and he wanted him to see it, and Mr. Shaw didn't pay much attention to it, but the letter stayed with me and I persuaded him to go up and look at it. So Mr. and Mrs. Tyler and Mr. Morgan and myself went up to look at the property. I believe it was just at Christmas time in 1933. I saw Mr. McKiver and Mr. Gilbert up there who showed me over the mine. [299]

They painted quite a glowing picture of it and not only that we cut some samples ourselves from places of course that they told us to cut the samples, and we took them to San Francisco and we had them assayed and the samples ran $76, which was very, very high, and we were quite excited about it, so we went back from San Francisco to the mine to make sure that we wouldn't lose it.

I nearly always made the trips to the mines with Mr. Shaw, because Mr. Shaw was in very poor health. One whole winter Mr. Shaw was on the stretcher unable to even sit up. People came

(Testimony of Edna Shaw.)

to the house to see him. Most of the conferences were at the house, because most of the time he was unable to go to the office.

Mr. Chaney, the engineer, came to the house, as did Mr. Reed Sampson, many times. Mr. Gilbert and his wife were up and house guests at our house.

I always went in the mine right along with Mr. Shaw and sometimes when he didn't go, even I went in with Mr. Gilbert and Mr. Sampson. Mr. Gilbert showed me places where the gold was more evident than others. There was one pocket that ran a thousand dollars, and he pointed to that, and there was one small place that ran $2700. That was in the main tunnel and not so very far in. I don't know just how far in. I figure the main tunnel is where they went in. The main tunnel is the tunnel where they did most of the work. There was a tunnel down by the ditch, that is what I [300] referred to as the main tunnel. We often picked up free gold. I had a large box of samples of free gold that I picked up off of the dump myself.

As to discussions with Mr. Chaney and Mr. Shaw and Mr. Sampson and Mr. Shaw and Mr. Gilbert and Mr. Shaw, I sat in on most of the conferences. They always painted very glowing pictures of the mine. I talked to Mr. McKiver about it many times. The picture, or rather the light with respect to the gold mine never did begin to darken. No one ever told us that it wasn't good mine. No one who ever

(Testimony of Edna Shaw.)

worked in the mine ever said it wasn't a good mine. Mr. Rowe even said that he thought the mine should make money and he thought it was all right. I asked him this morning and he said he still thought the mine was good and still thought it could make money.

They closed down because the man who was the superintendent who was running the mine was Holman O'Shea and I went up with Mr. Shaw on one trip and we found that they had 26 or 27 men on the payroll and they were doing a quarter of a ton a day and we thought something must surely be wrong. So I went up with Mr. Shaw and we found there was very few men there and the ones that were there were drunk, and Mr. O'Shea could not be found, and it was common knowledge that Mr. O'Shea was never sober.

Reed Sampson and Mr. Shaw and myself went up to Mr. O'Shea before that time as to why they were not making money [301] at the mine and we had heard the reports of high grading up there and we asked Mr. O'Shea about it and he said, yes, he knew there was high grading up there, but he thought from now on he could keep it down to a minimum and everything would be fine and the mine would be paying real soon.

After the mine was closed down we attempted to make investigations as to its condition so as to see what could be done about it. We took an engineer with us named Mr. Beachum, and he went

(Testimony of Edna Shaw.)

in the mine and looked through and said that the stopes were all caved in and it would be impossible for him to give us an opinion at that time.

That was after the mine had closed down for some time. I couldn't say just when. It was in 1938 some time.

I know something about Mr. Shaw's expenditures with respect to the mine. Mr. Shaw was very careless about his money or keeping track of it. He often paid engineers, he paid labor, he paid very many, many bills that he never kept track of that never could have been on the books because Mr. Jacobson, he knew that he had spent the money, but it was never turned in to them. I often quarreled with Mr. Shaw about doing that. He would pass it off. He is highly nervous and he just does things on the spur of the moment and there isn't anything you can do about it.

Cross Examination

As to the Monolith stock which I owned and converted into Consolidated Mines, that was stock turned over to me by [302] Mr. Shaw. I had previously done things for Mr. Shaw and he turned this stock and also moneys over to me. It wasn't money that I had of my own, but I could have used it if I wanted to.

I acquired that stock in my name. I believe it was in 1933. That was after the Monolith stockholders protective committee was started.

(Testimony of Edna Shaw.)

After we folks had looked at the mines on the first inspection trip we cut some samples ourselves, where they told us to cut them. We didn't know at that time that they could tell you right where to cut the samples and they would be good samples, but we thought that the whole thing would be that way.

We took samples from the Grand Prize Mine, and we also took some samples from the McKisson Mine. I wouldn't have been able to identify after I got those assays what part of the McKisson Mine I had taken my samples from. I would know now not to cut where they told me to.

When I say "free gold" I mean pieces of rock with gold in it, that is, some rock the gold is in in the sulphites and you can't see the gold, and some rock has gold in, and that is free gold. I didn't mean little nuggets. I meant pieces of gold in the rock. I learned from practice up there how to pan for gold myself. [303]

W. J. SHAW

a witness in his own behalf, testified as follows:

Direct Examination

I am the defendant in this case. As to the Stockholders Monolith Committee, the reorganization took place in 1932, but there was another committee organized in '31. I had nothing to do with the organi-

(Testimony of W. J. Shaw.)

zation of that committee. In 1931 that was organized by E. S. Harding, a substantial stockholder, and his relatives who were stockholders, and a few other stockholders of the Monolith Portland Cement Company and the Monolith Portland Midwest Company.

Mr. Morgan was not in that group, but I was called in by the Harding group around the fall of 1931 for the purpose of assisting them in making an investigation of the books and records of the two cement companies, and then it was agreed that a reorganization of that old committee should take place. They felt that I had a moral obligation, and I did, too.

I was the underwriter of the original Monolith issue. I organized that company and underwrote the issue of one million dollars and a half under the name of W. J. Shaw & Company, of which I was the sole owner of that organization.

Mr. Harding had contacted a Mr. W. J. Gasco who was in the financial department of the Monolith Companies, and he arranged a meeting with me with Mr. Gasco, whom I also knew very well, and Mr. Gasco was in possession of an original assignment from Coy Burnett who was president of the organization, or vice-president of the Monolith Portland Cement Com- [304] pany. Where he, Fred Balen, who was the original president, had sold to Coy Burnett the control of the Monolith Portland

(Testimony of W. J. Shaw.)

Cement Company for a consideration of $500,000 payable on the same date and practically the same amount that Shaw & Company were to pay to the corporation for treasury stock on the basis of so much a month. The latter ran up to a hundred thousand dollars a month that I agreed to furnish the corporation under this underwriting agreement. And it showed that when that was made around 1922 at the time or on the same day or a few days after that I had made my underwriting agreement with the corporation, and it was treasury stock of the Monolith Companies that was being used to pay off, to buy out Fred A. Balen, the control of those two companies.

Then he also had some photostatic copies of some private operations, private books of Coy Burnett, of which it showed in excess of $6,000 or $7,000 at that time.

Then we called a reorganization of the committee, and Mr. Harding was to be the chairman. Mr. La Grange was to be the other member, and W. J. Gasco should come in and be the other member. Then I met Mr. Morgan on about March 1932 and he wanted to come into the committee, so he came over and we finally decided that Mr. Morgan should be the chairman and Mr. Harding should be the secretary. So Mr. Morgan became the chairman of the Monolith Committee.

These members were in entire charge of the committee, [305] and on my deal with them was that I

(Testimony of W. J. Shaw.)

would work 60 days as an investigator to get all this data together, to employ people and auditors, free of charge.

I worked 60 days, but at the end of 60 days I found out that it didn't appear that anyone was capable of handling the affairs of the committee. There were some letters that were sent out by Mr. Morgan that had Mr. Hatfield and I. A. Haight and Mr. Silverberg.

I employed attorneys at that time. The first thing I did before I became connected with the committee, I went up to see George J. Hatfield, who was then U. S. Attorney of the Northern District of California. We made a deal with him to represent us. And then we made a deal to have Milton Silverberg to represent us down here, and I believe I put up that first fee of $1500 out of my pocket.

Later we employed Thomas and Moore as certified public accountants here to start an audit of the books and records, and the committee had no funds outside of what I had advanced them.

I advanced them all the funds. Nobody put up any money but me. Up to that time it was probably a couple or three thousand dollars, but I guaranteed the auditors' bill to make an audit in behalf of Messrs. Silverberg and Morgan. After they worked for four or five or six weeks, the officers kicked them out and then we had to go in and employ counsel to go to court to have the auditors

(Testimony of W. J. Shaw.)

authorized [306] to proceed with the work, and Judge Emmett Wilson, after two or three months' fight, ordered the audit of the books made and appointed his own auditors, Lybrand, Ross Bros. & Montgomery. Then I had to go to them and guarantee their bill because the committee had no funds. That bill ran over $10,000.

We sent out a letter, Mr. Morgan did, and I helped him draft that letter. The attorneys went over it, Mr. Hatfield, Mr. Silverberg, and it was thought that we would secure sufficient funds to prosecute this action by sending out a letter and asking them to contribute 50 cents a share for that purpose, but the letter didn't bring enough in to pay the postage.

Mr. Morgan employed a man by the name of A. R. Griffin, who had had a great deal of experience in raising money for stockholders, and he was employed as a sales manager, and then employed other men under him to go out personally and see the stockholders.

Mr. A. R. Griffin employed a number of solicitors, maybe 40 or 50. There was a great turnover. They were unable to make their expenses there at first.

Mr. Griffin raised about some $20,000 or $22,000, but the expense at the time when that amount of money was raised and we were in debt probably $35,000 or $40,000, which is practically all of the money I guaranteed personally, then I took the lead. [307]

(Testimony of W. J. Shaw.)

I started out and got ahold of some of the large shareholders that owned 4,000 shares and I closed them personally. Robert Pitcairn had 4100 shares. I collected $2,000 from him and, by the way, I charged the committee no commission. The commissions were running 40 and 50 per cent to these salesmen, but all the money that I collected, which was the largest volume of the big ones, I never charged this committee one dollar of commissions.

I procured some of the stock to be deposited with the committee. It was finally agreed through Mr. Morgan, which was approved as a great idea by the attorneys, the letters in the file there corroborate that statement, that we should have the stock on deposit.

It was for the purpose of having the vote and right to represent them in stockholders' meetings and to represent them in legal matters, and also to keep Mr. Burnett from buying up all this cheap stock at 15 and 20 cents a share for the Midwest, 50 cents a share.

It was 15 cents a share in 1932 when the depositary agreement was made on the Midwest, and the common occasionally you do sell a hundred shares from 50 to 75, and occasionally you might get rid of a hundred or 200 shares of preferred if you found a buyer up to as high as $1.25, but no market. You had to go to some broker's firm where they had salesmen and they would go out and resell them.

(Testimony of W. J. Shaw.)

I got around 50 percent, or 10 percent of the out-
[308] standing stock deposited. Ten or 15 percent of the total outstanding Monolith, both companies.

I did not control the power of these stockholders to release their stock from the depositary. I had no authority to have that stock released, but I finally was appointed executive secretary, because the bank kept denying me information when I would go there to the bank, and that was about the only way that I used the power of executive secretary. That was cancelled, however, in a few months after I was appointed. And then Mr. Morgan would be out of the city and Mr. La Grange would be out of the city and I was negotiating with additional attorneys, and I had that authority, but I never used it in any way outside of asking for the release of the stock in the bank.

The depositary agreement was finally prepared by Haight and Tripett and Syverston, and Milton Silverberg, Hatfield, all the attorneys had something to do with it.

(Stockholders Protective Agreement Offered)

(The document referred to was received in evidence and marked "Defendant's Exhibit H.")

After we had got the court's auditors in there proceeding with the investigation, I had a meeting with Raymond Haight, of the Haight and Tripett firm at that time, who was representing another

(Testimony of W. J. Shaw.)

group of substantial stockholders in San Diego on this same supposed litigation, and he was about ready to file a complaint, but I got Haight and Tripett and Silverberg and Hatfield to work together, [309] and I think I *have* Ray Haight a $3,000 check for a fee. I believe that came out of my personal funds. I don't know. I think it did.

So they proceeded to fight action in behalf of the corporation based upon the audit of the court, which showed that there were some $2,000,000 taken by Coy Burnett illegally. I did all of the investigating on that. They testified in court they couldn't have won the lawsuit without me. I worked from 10 to 18 hours a day for a year. I finally got possession of all of the executive reports, the secret set of books kept by Mr. Burnett, photostatic copies of all of the minutes of the Monolith Company, a photostatic copy of all of the minutes of the Midwest Company—in fact, so to speak, I got the works,—and presented them to the attorneys to try this lawsuit, and it resulted in a judgment in the amount that you have heard before. The sum of $225,000 was ultimately recovered. The judgment was $820,000, but payable in kind.

It was settled in Judge Shinn's court with an offer that he could pay $820,000 cash or he could buy up the 75,000 shares of the common stock, which it was shown that he took illegally, for $1.50 a share and pay the balance in cash.

(Testimony of W. J. Shaw.)

That settlement, of course, I objected to and had a little run-in with Haight and Trippet—we didn't speak for a few weeks—and I sent out a notice to all the stock- [310] holders—I did—addressed to Haight and Trippet not to accept this settlement.

HOMER J. ARNOLD

a witness for the Defendant, testified as follows:

Direct Examination

I testified yesterday afternoon with respect to certificate No. 732 for 250 shares made out to myself and wife as joint tenants.

Mr. Shaw had told me about it, the first time I heard of it, although I did see Mr. Shaw quite regularly. The first I had heard of it was when Mr. Morgan got my name, evidently from the committee list, and called about this transfer that some of them were making. But I didn't talk with him any further.

Then the next time I saw Mr. Shaw I spoke to him about it. He said he was keeping me in mind, but he was waiting until things got a little further along before he said anything to me about it.

Mr. Morgan called me on the telephone. The time I discussed this with Mr. Shaw was some weeks or a few months prior to the month of December 1936. I think that was when I got the stock.

(Testimony of Homer J. Arnold.)

Mrs. Arnold was present at that conversation, outside of Mr. Shaw and myself.

At different times different things were said. It wasn't [311] any one conversation, but it was about the general prospects of the mine.

He said that it wasn't a big mine, but what ore there was was running pretty high grade, around, as I remember it, $18; that if they could get a mill of about 25 tons on there it ought, in time, to turn out a reasonable profit. He did not tell me who else was in the deal.

I have known Mr. Shaw since 1924. He has been a patient of mine through that time, and besides that I have considered him a very good friend, and he has given me quite a little business advice from time to time.

I got cash for the sale of my Monolith,—$420. Then $80 was added to that for medical services. So that I put $500 in that proposition.

Mr. Shaw only told me about the deal, if I would invest it would have a very good chance of turning out quite a reasonable profit, and at any time that I wasn't satisfied, why, he would give me my money back. I never asked for my money back. I was never dissatisfied with his part of it.

I treated Mr. Shaw. I practice osteopathic work. I am blind.

At the time that Mr. Hughes and his partner—I have forgotten his name—first came out to talk to me about the—I think it was two years ago this

(Testimony of Homer J. Arnold.)

summer when they first came out—they wanted a statement at that time as to what our dealings had been, and then at a later time they [312] came to me again. That is when they asked for the stock certificate, and I hesitated in handing it out—I don't know, I never cared to just turn loose on any certificate that I had, even if it was to a Government representative—and so I asked Mr. Shaw in the meantime—I told him that they were asking me these questions and wanted my certificate, and was it all right. And he said, "By all means. Go ahead and give it to them and give every cooperation and everything that they want to know. Don't hold back anything."

I let them have the certificate then, and I gave them a statement as to the best of my recollection. They took it and wrote it up and had me sign it.

W. J. SHAW

a witness in his own behalf, further testified as follows:

Direct Examination

(Cont'd)

When I was conducting my campaign with respect to the monolith Stockholders Committee, it was agreed that I should not be known until after I got all of the evidence, and as soon as I felt that

(Testimony of W. J. Shaw.)

I had secured sufficient evidence to go ahead with the trial of the case, then I came out and moved out from my little room, investigating room, into the office of the committee and took charge of the Los Angeles office. We had a San Francisco office, too, where Mr. Morgan and Mr. Harding had charge. We made all of our reports to Mr. Morgan [313] our daily reports of collections and evidence, and so forth and so on, to the home office.

There was other contact that I had with the stockholders after the proposed settlement was had other than this letter of mine. I called a meeting of the shareholders in this district to make a protest against the settlement, and they passed a resolution —The meeting was held at 704 South Spring Street, in the fall of '33. There were present at that meeting Mr. Morgan and Mr. La Grange, who was on the committee, Mr. Alexander, who was secretary of the committee, who had succeeded Mr. Morgan then, and Mr. Pitcairn, Dr. Cobb, and quite a number of others who were substantial stockholders, and Raymond Haight came down and Arthur Syvertson, of Haight, Trippet & Syvertson.

We proceeded with the meeting, and Mr. Haight and Mr. Syvertson thought that we should accept the offer, but I protested against it for two reasons: First, that I didn't think it was a fair settlement to the stockholders and, second, Haight and Trippet refused to bring a separate action for the

(Testimony of W. J. Shaw.)

return of the 50 cents a share which the stockholders had advanced.

They held that there was no law, that the court had no authority, and that I would be more or less simple to try to secure the return of those funds. It busted up in quite an argument. We were not speaking for a few weeks.

Then I employed Jerry Giesler on behalf of the committee [314] and Earl Daniels and Meyer Willner and also secured outside counsel, advice from Edward K. Brown, who found a law that the court—

The action was filed and we recovered the 50 cents a share back for the shareholders, and at my suggestion, to keep the funds away from Mr. Morgan, I suggested to the court that Edward Cassidy, who was with Lybrand, Ross Bros. & Montgomery, be appointed as trustee to return that money direct to the shareholders. That was done. $65,000 was returned to the shareholders. It represented 85 percent because the trustee's fees came out of the 100 percent.

After the stockholders had won the lawsuit,— The judgment was rendered in July '33, and then I had agreed to follow my doctor's advice and get a place on the beach and keep quiet for a few weeks.

Then in around the fall of '33 I started out to look for some business to go into, and there were at least a dozen different promising propositions.

Mr. Tyler came from the city of Detroit in the

(Testimony of W. J. Shaw.)

fall, I believe, of '33. I sent him some money to come here, he and his family. He was out of work. I heard that he was an outstanding engineer, but at that time I didn't connect mining engineer with a civil engineer. He had supervised, I was told, some big projects.

As to how I happen to come into contact or learn about the McKisson and Porteous claims, we had a letter from Mr. [315] Gilbert, whom I have known favorably for a number of years, telling us that he had, I believe, two or three mining properties and they were, the way he spoke of them, he had really found something.

After I had received the letter—in a week or 10 days later after I received the letter—Mrs. Shaw picked up the letter and said, "This is a coming business, this gold mining business, and you have Mr. Tyler living here with his family with us, and he isn't doing anything." Mr. Tyler is a brother-in-law. Mr. Tyler and I married sisters. He was living with us as our houseguest.

Mr. and Mrs. Tyler and Mrs. Shaw and Mr. Morgan and myself, went up and met Mr. Gilbert and a Mr. McKiver at Jackson, California. We went over the Grand Prize Mine. We went down a shaft about 37 feet. We took some samples, spent about a day or a day and a half there with Mr. Gilbert. We proceeded to go to San Francisco.

The Grand Prize is the Porteous claim. And we went to the McKisson Mine and then proceeded to

(Testimony of W. J. Shaw.)

San Francisco and we were there a day and I said, or Mr. Tyler I believe said, "Why don't you have this ore assayed?"

And I said, "Well, we will take them down to Smith-Emery."

I said, "I am acquainted with them and they are reliable and see if there is anything to it."

And another day or two we went down there and got the [316] samples and were on our way back to Los Angeles and the assayer, I said, "What do they assay?"

And he said, "Well, around $70 or $72 a ton."

I said, "Does that mean anything?"

He said, "Why, that means a lot. That is a very healthy ore."

I called up Mr. Morgan over in Oakland and told him about it. He had had a great deal of mining experience, or at least I thought so at that time, and he said, "If you have got any ore that will run over $20, you have got a good paying mine."

So we changed our plans and instead of going to Los Angeles we hurried back to Jackson to meet Mr. McKiver and Mr. Gilbert. And we couldn't get down there quick enough, because we heard someone else was going to take over this property. And the deal was closed on all three properties before we left there.

The deal was closed in the name of Frank S. Tyler, for the reason that Mr. Tyler was looking

(Testimony of W. J. Shaw.)

for a business. He had a man very wealthy in Detroit that was looking for mines, and he told me before we had gone up to look at the mines that if they would stand up with an engineer's report that he could get all the money he needed from this friend in Detroit. And they were turned over without any consideration from me, without any promise of help financially until this Detroit man could get here, because I had practically decided to stay [317] out of business for a while longer.

There was no misunderstanding about giving me any share of the net profits. We didn't discuss that at all. He did not at that time owe me very much money. I think I had rented this home of Mrs. Franklin's. I gave her a check for $300.00 for a year's rent, and I gave that to him and just other funds over a period of five or six months as he needed it. That ran along until I think the following year around June or July and Mr. Tyler had owed me considerable money in another deal that I had given him a sixth interest in. That was the Malibu pleasure fishing deal out in Malibu where there was quite an investment. I got all that money for that and got all of the boats and gave Mr. Tyler a sixth interest in that. I think that was in '33 or '34.

The fishing deal turned out very successful for the other people. I came back from San Francisco one day where I went to buy another barge, but

(Testimony of W. J. Shaw.)

when I got back, why, the two men that I had backed said that they had decided I had better see their attorney on this partnership agreement, and as a result Call and Murphy waited some time later until they sold out and sued them for $80,000 as my part of the interest which I had figured as I had of my part coming.

As to when I made any arrangement with Mr. Tyler with respect to the mine, I think that was in the early summer of 1935. As to whether I made an arrangement with him before the letter that he signed of July 1, 1935, I don't [318] recall any agreement that we had.

After Mr. Tyler informed Mr. Morgan and myself and the others in the office that he was unable to get this man to come here to finance him, it was decided—I was in the meeting when it was decided—that we would choose about six or seven of the largest stockholders of this committee and get them to put up 8,000 shares of the preferred stock and 20,000 worth of cash for a 60 per cent interest, and I made a list of those six or seven or eight people. Mr. Pitcairn owned 2,000 shares of Monolith preferred. Mr. Wikoff owned about 1250 or 600 shares. Two of his associates owned about four or five hundred shares apiece. Mr. Morgan and Mrs. Morgan owned 640 shares of preferred. Mr. Marcus, who was a member of the committee—Mrs. Shaw had some 500 shares of preferred. Anyhow, it totaled up about 12 or 15 thousand shares of preferred stock.

(Testimony of W. J. Shaw.)

Mr. Morgan signed up first. Mr. Wikoff, who was a member of the committee, chairman of the Monolith protective agreement committee who succeeded Mr. Morgan when he resigned, and also a member of the executive committee, turned over his stock and cash and Mr. Marcus did the same. Mr. Pitcairn came down with his stock, but it didn't go through because he told his wife about it and she seemed to be the boss, so he couldn't complete his deal on 2,000 shares.

Mr. Morgan said, "Well, I will have to talk to my wife, and if I am going to be made the president of this corpora- [319] tion, why, I know she will go through." But that kept on and kept on, and we never did get Mr. Morgan's stock or his cash. It finally wound up that he said I owed him $25,000 and he wouldn't sign the settlement of the committee or do anything until I paid him $25,000.

This agreement is dated the 6th day of February, 1934. I had no interest in the deal at that time. I did not employ the attorneys to draw that agreement. I know who did draw it. It was Guy Graves of Call and Murphy.

I don't recall paying them anything for that. However, I did pay them later on a thousand dollars toward their fee of the Consolidated Mines of California; that is a year later, a year and a half.

(Announced that the date of the Partnership Agreement was February 6, 1934.)

(Testimony of W. J. Shaw.)

The date of the profit agreement that Mr. Tyler gave me was July, 1935.

(Announced that the date of the Profit Agreement was July 1, 1935.)

(As to the Corporation):

Mr. Montgomery: The certificate here shows that it was incorporated under the laws of the state on the 19th day of September 1934 and then on the 3rd day of May 1935 there was filed an amendment changing the amount of capital stock. [320]

(By the Witness):

The incorporation was filed and 450,000 shares were authorized to be issued by the Corporation Commissioner. 150,000 shares was to be free stock, that is, stock issued to the owners in this partnership agreement. That partnership agreement with the names, the subscribers' names on it, was filed with the Corporation Commissioner and the stock finally was ordered issued direct to them and the 300,000 shares was put into escrow at the California Bank under the name of Frank S. Tyler as trustee for the owners of the 150,000 shares, but under the escrow agreement their dividends could be paid on the 300,000 shares and it could not be released until the owners of the 150,000 shares got their money back, or further orders from the Corporation Commissioner. That 300,000 shares was the voting control of the corporation. That left 550,000 shares in the treasury, which has not been touched or any

(Testimony of W. J. Shaw.)

part been sold or any application to have any of it sold.

The attorneys that took care of that transaction are George J. Hatfield and Call and Murphy. Mr. Guy Graves is of the firm of Call and Murphy. He and Mr. Hatfield did the legal work in connection with the filing of the application. Mr. Hatfield and Mr. Graves got the permit also, and they also incorporated the company. In fact, they handled all of the business and no one, not even Mr. Tyler or Mr. Morgan, or anyone, had anything to do with the cor- [321] poration other than go through the attorneys. All advice all through the whole operations was all approved all by the lawyers. This agreement, and every act of any matter of any kind, I always got legal advice from the attorney.

Mr. Tyler got legal advice from the same lawyers. At the time Mr. Tyler signed up to give me 80 per cent,—I don't know how much money I had advanced to him then, because I never looked at the books in my life and I don't know anything about figures. I never looked over books in my life that I can remember. I don't understand them. I am very bad at figures. I always had good auditors, C.P.S.'s. I got Louis R. Jacobson. He came to me very highly recommended after I had checked his references for about two months. These transactions with respect to the mines in the exchange of the stock, and in taking care of the bookkeeping and that sort of thing, took place at the Banks-Huntley

(Testimony of W. J. Shaw.)

Building in Los Angeles. That was the office of W. J. Shaw and Company, Consolidated Mines, and the Monolith Stockholders Committee. I believe the Monolith Stockholders Committeee name was on the door, but I am not sure.

I discussed with some of the stockholders the matter of exchanging their stock for Monolith stock for the mining company stock. In fact, I made I think two or three sales myself.

I put Mrs. Shaw's stock into the mining deal for her. She always had quite a lot of Midwest, but by the way, we [322] were not taking Midwest stock at that time, because it looked like I was going to go out and have to do the same job over for the Midwest of investigating and lawsuits that I did for the Monolith, and as long as we were representing the Midwest on the committee, we were not going to accept the Midwest because we were going to, supposed to go ahead and represent in another lawsuit.

With regard to the Midwest claims, we brought the largest suit after long litigation and after I had advanced them $18,500 going over the same route again, and wound up that it was the longest lawsuit complaint that was ever filed in California. It took 300,000 legal sheets of paper to print that complaint. It was a duplication for their money back.

In other words, if you had 2,000 stockholders or shareholders, each one of them was suing for their

(Testimony of W. J. Shaw.)

money back and you had to duplicate each one of the complaints.

George A. Hatfield, Haight, Trippet & Syvertson brought that suit. The result was a settlement after they had been demurred out of court for about six or seven different times. We were advised that we had better make any kind of a settlement that we could get, that is, that was the advice of the lawyers. And I made a deal where the defendants, Monolith Portland Midwest Company, Coy Burnett and others, would buy at least 50,000 shares of Midwest stock at a price of $2.50 a share. Prior to that time I think the records [323] will show that it was offered for 50 cents a share with no sales, no buyers. And they agreed to pay back $45,000 that we had collected from the shareholders of the Midwest Company and the attorneys' fees and part of what they owed me under a contract, and I believe all of the costs of the litigation.

I have no records when that settlement was. They were all taken away from me, but what I figure from the attorneys, I will have to guess on that. I believe it was '36.

I believe that letter, Judge, refers to the Monolith settlement and not the Midwest.

As to the Monolith settlement, and a $12,000 payment to be made to me, that was for the investigation and work that I had done in behalf of the trial of the case. The court did not take into consideration some $11,000 I had paid out for photostatic

(Testimony of W. J. Shaw.)

copies and the other work, and they did not take into consideration the agreement I had with the committee, because the court held that was separate.

That was an agreement whereby I was to get so much money for my services as chief investigator and for all the moneys that I had advanced to the committee, but the settlement of the Midwest, I believe, was in '36. I can get the definite date from my papers.

I did not offer to pay Mr. Morgan at any time any portion of this $12,000. He claimed half of everything I got. I never made any agreement with him to pay him half of everything I got. I had no agreement with Mr. Morgan. However, [324] I did pay him in excess of, from what he got from the committee and what I gave him ran in excess of $12,000, probably $15,000.

(File of Pacific National Bank of San Francisco offered.)

(The document referred to was received in evidence and marked "Government's Exhibit No. 1.")

(Testimony of James Kruse.)

JAMES KRUSE

a witness for the Government, testified as follows:

Direct Examination

I was a stockholder in the Monolith Portland Cement Company, and also a stockholder in the Monolith Midwest,— the Wyoming company. I owned in the California company, 54 preferred and 50 common, and in the Midwest 270.

(Examining document) March 9, 1934, is right. Previous to that date I had a conversation with Mr. Alexander, at my home at 1127 Laguna, in San Francisco. There was another man there, but I don't know his name. He was a little bit taller and a little bit fuller than him. In fact, I didn't take much notice of him, because I didn't like the idea.

They put a proposition up to me about his mine. It was a very good investment, he said, and it was a very good location, and it would be a cheap operation. In fact, if they only got $10 a ton they would make a good profit. But the [325] things looked very good and they expected that the mine would be in operation in three months, and she would turn out at least 30 percent dividends. He didn't say what period that would cover.

Alexander was doing the talking. I did not make any transaction.

Following that I went over to Oakland to see Mr. Morgan in the Oakland Hotel. I did see Mr. Morgan. Mr. Morgan and I had a conversation. He

(Testimony of James Kruse.)

thought it was a very good proposition and the gold was up now and it would be a good idea to have a try at it and he was for it, and I said, "If you are for it, I will go with you."

Then he introduced me to two men, Alexander and another fellow. I had met Mr. Alexander previous to seeing Mr. Morgan at the hotel, but then I seen him again in the hotel there. He was there with another man, a heavy-set fellow, the same man that I had seen him with at my house. No one else was present besides we three, Alexander, this other man, and I.

We had a talk about it and put a proposition up to me: It was a good thing, and so, of course, I took Mr. Morgan's advice and I agreed that I would turn over the stock.

This document is a receipt that was given to me by Mr. Alexander the next day when they came over and got the stock in San Francisco where I lived. Alexander and the other man, they came and I gave him the 54 shares of Monolith preferred, [326] and $87.50 in cash. That was March 9th.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 113.")

Thereafter I received several letters through the United States mails concerning this mining enterprise.

Some months later on at my city at the William

(Testimony of James Kruse.)

Taylor Hotel, Tyler called me up with respect to this proposition. We took a ride in a car. It must have been in '34, shortly after the first transaction. He told me all about the mine and one thing and another. It was just an ordinary conversation, that it was a good investment and it proved better than they expected, and so forth.

He told—the other time he told me that there was, I forget now how many tons of ore was blocked out there, and the other time he told me they had sent to the smelter and shown a $38 a ton.

I had several conversations with Mr. Tyler. He came down there frequently. He was not always alone. He had a man with him very often. There was a heavy-set fellow with him, kind of a Jewish fellow. It was a Mr. Wohlberg. He wanted to try and get any stocks that I had.

Mr. Shaw called me up on the telephone at my home, in 1127 Laguna Street. Mr. Shaw was at the William Taylor Hotel. He wanted to see me, to come up and see him. I had not met him before. He recollected meeting me and was very anxious to see me on some dealings I had with him before. I went [327] alone to the William Taylor Hotel and saw Mr. Shaw in his room. I told him about the dealings we had before with A. Mister & Son, so he said he recognized that and he had lost so much money during the crash, and he knowed that I lost money in the crash, and he wanted to help me that I get my money back again. And he was talking about the

(Testimony of James Kruse.)

mine, how good a proposition it was, and to take all I could get. He always told me it was not expensive to operate the mine; it would be a profit if they had $10 a ton, but it ran up to $20 and more. He did not mention the expenses that the company would have to pay to operate the mine.

The first time that I visited Mr. Shaw in the William Taylor Hotel in his room I took 250 shares for $500. That was at the time I received a certificate for 41 shares. Mr. Shaw gave me the 4100 shares, on account of my losses in the A. Mister & Son.

As to this letter on the stationery of Consolidated Mines of California, dated March 26, 1936, I received this letter through the mails about March 26th.

(The document referred to was received in evidence and marked "Government's Exhibit No. 114.")

Mr. Norcop: It is signed by W. J. Shaw and dictated "WJS:S." Reading:

"I have your favor of March 3rd and in accordance with your request and our understanding am enclosing certificate for 41 shares [328] of stock of the Consolidated Mines of California. Mr. Frank S. Tyler is in the north at the present time and is expected to be in San Francisco within the next few days at which time he will call you and give you the latest developments on our mine."

(Testimony of James Kruse.)

(By the Witness:)

Mr. Tyler called at my home shortly after I received this letter. He came up alone. No one was there besides he and I. We talked about the usual thing, they had been down to the mine and it looked very promising, in fact better than they expected, and that they were working on the mill, that they were working full-time, and that there was a lot of ore blocked out, and so forth.

I do not recollect whether or not I made another investment in the mining proposition with Mr. Tyler at that time. I got the shares and afterwards had to send them back again, because they had to alter them in some way. I sent them all back in. Then I got them back again.

Later on, Tyler came to me with a car and got me, brought me down to the St. Francis Hotel. Shaw had just come from the mine. Mr. Shaw was up in his room in the hotel. Mr. Tyler and I went up there to Mr. Shaw's room. We started the usual conversation. Mr. Tyler remained just for a little while.

They just talked about the mine, and afterwards he wanted [329] Shaw to go down and get some cigars. No, Shaw told Tyler to go down to get some cigars, and Mr. Tyler left the room.

Mr. Shaw said he is just finishing up now. There was only about 500 shares left, and he told me I better take them because it was a good investment.

(Testimony of James Kruse.)

He was going to reduce them to me for $800, from a thousand. I refused to take them. I couldn't take them for that. And afterwards he let me have them for $600 because I had lost so much money in the Pacific Stores and A. Mister & Son. I was paying $500 for the 600 shares.

I received this letter on the stationery of W. J. Shaw & Company and dated March 8, 1937, and that is the envelope. My total investment in Consolidated Mines finally amounted to 1,500 shares.

In Midwest Company I got share for share back. I paid $10 a share and I got $2.00, and I pay $2.00 a share for them. The 54 shares I got $10 a share. They paid me $10 a share. I didn't figure out how much cash I invested altogether.

(Document Exhibited)

Mr. Shaw cut it out. I didn't see what was in it. He had it on the table there and he cut this piece out and the other piece I signed, but he had cut a piece out there,—a duplicate of this here. The paper was in this condition when Mr. Shaw gave it to me. He gave it to me on or about the date that is shown up here. That was 250 shares for $500 [330] cash.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 115.")

This transaction is the $500 cash. The other one was the stock.

(Testimony of James Kruse.)

As to this letter dated January 23, 1936, on the stationery of the Consolidated Mines of California, I received that letter through the United States mails.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 116.")

As to this two-page letter on the same stationery, dated January 7, 1935, I received that letter through the mails on or about or shortly after the date it bears.

(The document referred to was received in evidence and marked as "Government's Exhiit No. 117.")

As to a letter on the stationery of the Monolith Stockholders Committee, Los Angeles, California, dated May 12, 1934, I received that through the mails. It has the signature of W. J. Morgan, and with reference to this letter on the Consolidated Mines' stationery, dated July 12, 1935, which also has the W. J. Morgan signature, I received that letter, and with reference to this letter on the Consolidated stationery, dated August 8, 1935, and having Frank S. Tyler's signature, I received that letter.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 118.") [331]

(Testimony of James Kruse.)

As to the letter dated September 17, 1935, addressed to the stockholders, I received that.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 119.")

As to this processed letter dated November 8, 1935, Frank S. Tyler, Consolidated Mines of California, I received that one.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 120.")

This one of November 16, 1935, on the Consolidated stationery, I received that letter.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 121.")

And this circular letter on the Consolidated stationery, dated February 21, 1936, and this letter dated June 12, 1936, addressed to me at 1127 Laguna Street, San Francisco, signed by Frank S. Tyler, with the initial "S.", I received that.

(The document referred to was received in evidence and marked as "Government's Exhibit No. 122.")

This one of July 1, 1937, I received that through the mails.

And this letter of September 1, 1937, I received that letter through the mails.

(Testimony of James Kruse.)

(The document referred to was received in evidence and marked as "Government's Exhibit No. 123.") [332]

In making my various investments that I made, I did not exactly rely on the statements that Mr. Alexander made to me in his conversations concerning this mining venture. I relied on Mr. Morgan. After I talked with Mr. Morgan, then I was willing to invest.

Following that I relied upon my conversations with Mr. Shaw when I made that additional investment of $500. I believed what he said to me was correct.

Cross Examination

At my first talk with Mr. Tyler, I didn't like the idea, so I didn't make any investment at that time. Either the next day or the day after I went down to Oakland to see Morgan. He interested me and then—I said, "If you are for it, I will go with you."

The first number of shares that I bought was 439. I talked to Alexander about that. I got the stock quite a long ways afterwards.

I went up to the mine in August, after I had bought everything. I didn't go up there before. Gilbert was there.

Those shares, what I got, I had to send them all back again. They had to alter something on it. I did not know about the matter being presented to the Corporation Commissioner of California. When

(Testimony of James Kruse.)

I was up at the mine I went in the bottom tunnel and I went up the stoop. I went up the ladder. It hadn't dry-rotted at that time. There was that second cut in there that didn't go outdoors at all but just [333] went along inside, halfway between the upper and lower tunnels just a little ways. I went into that.

I did not go into the top tunnel. The mill was working. It was right close to the entrance, just a little bit off the entrance of the lower tunnel. They had five stamps there. They were operating at the time.

As to how many tons they told me they were putting through, I forgot. They told me about it, but I have forgotten.

After I went up there I don't believe I bought any more stock. I think it was in August in 1936.

I talked to Mr. Shaw at the St. Francis Hotel. I haven't got the date when it was. He was coming from the mine, him and his wife, and he sent Tyler for me. Tyler came in the machine and brought me down to the hotel. I talked with him. That was the time that he told Tyler to go down and get some cigars, because he knew that I didn't smoke cigarettes or drink, I suppose, so he wanted to treat me to a cigar.

As to Exhibit No. 15, I didn't see him write it. I got the letter from Shaw. That was the date that he talked to me. It was on a Sunday. I don't know what that is that is cut out there. Very likely that

(Testimony of James Kruse.)

was Mr. Tyler's address. I don't know. I didn't see it. He just cut it out and he handed me that and I signed the other one.

(Examining map) I haven't seen it. He told me the length of the tunnel there. I couldn't say whether it was 70 foot or not. What you are running your pencil through is [334] the lower tunnel. Where I went up the ladder is a little bit further down. There was quite a bit done there. I didn't go in the upper tunnel. He was busy. I didn't go up in the top. Not on the top of the hill at all.

I am not so sure about the date but, as far as I can remember, it was on the 17th of August 1936. It couldn't have been '35. I went up on the stage. I happened to go up because I just wanted to; I was interested; I wanted to see what it was, because I had my doubts about it. It was not raining when I went up there. I went up to Stockter and then I took another stage to Jackson, then I took a ride with some truck down there further down, and another fellow took me down there.

I didn't write to Mr. Shaw. I wrote one letter about the stocks, when they were going to send the stocks. I didn't write to Mr. Shaw personally. I didn't write to him after I had been up to the mine.

(Examining document) I have no recollection of that. Gilbert was managing the mine at that time. No one was above him at all. There was another fellow there—I forget his name now. I think he was some kind of an assistant there. He was working in

(Testimony of James Kruse.)

the lower tunnel there. I don't know exactly where he was working, but he seemed to be some second boss there. I spoke to him first. His name was not Lytle. [335]

Mr. Norcop:

"March 8, 1937

Mr. James Kruse
1127 Laguna Street
San Francisco, California

Dear Mr. Kruse:

"My reason for not answering your letter promptly is that I have been expecting to come to San Francisco every day for some time, and I thought it best to have a personal talk with you, to go over the matter, so that you might understand the whole situation.

I will be in San Francisco very soon now, and will give you a call upon my arrival.

With kindest regards,

Very truly yours,

W. J. SHAW (signed)

WJS:S"

This is on the stationery of W. J. Shaw & Company, Investments, with the Los Angeles address.

Redirect Examination

After receiving that letter Mr. Shaw came down to the house, down to my place, at 1127 Laguna Street. He was with Tyler.

(Testimony of James Kruse.)

I can't think about this here, whether it was in the St. [336] Francis Hotel—it must have been in the St. Francis Hotel. That must have been the trip when Tyler took me down to the St. Francis Hotel. I only seen him three times—it must have been at the time when I invested the $600 for 500 shares. That is the time.

Mr. Montgomery: I will call the witness' attention to the fact that his certificate for 500 shares was on April 15, 1936.

(By the Witness:) I don't recall that.

P. G. McKENRY

a witness for the Defendant, testified as follows:

Direct Examination

I am a mining engineer and auditor. I was engaged in the Lybrand, Ross Bros. & Montgomery auditing firm. I was one of the auditors that was on this Monolith proposition. I went to the School of Mines at Stanford University, and graduated in '26.

I was engineer for the Mary Anne Mining Company out of Oraville in Colusa County, and for the S. C. P. Corporation up in Garden Valley out of Auburn. And I was interested in an operation at the Old Tumco, T-u-m-c-o, Mine at Oglesby, California, 15 minutes from Yuma, Arizona. And I also went up to work on the Consolidated Mines of Cali-

(Testimony of P. G. McKenry.)

fornia, the McKisson Mine, as I knew it, in 1934, I think, on June 1st, and was there until September 1, 1934. I was there three months. [337] This was after the auditing had been completed by the Monolith Committee with regard to the first suit.

At the McKisson mine I was engineer in charge of development. I drove an extension of the tunnel that was in the lower section of the mine known as the ditch tunnel and about 650 feet in I drove a cross-cut of 125 feet, attempting to contact the vein known as the back vein on the property. I have looked at that map, U. S. Exhibit No. 108. The vein, the McKisson vein, is showing in the lower tunnel. That is where I did my work.

This is the cross-cut that is shown on U. S. Exhibit 112. I did not make the raise. In that ditch tunnel that I mined I found the vein very narrow and erratic, as far as values were concerned. There were times in there where the ore would come in and when it came in, it came in with a horse and we were always driving into the vein matter, and there were times where I would cut an assay out of the middle of the face just after blasting and the values would run all the way from a trace to $20 or $30. I kept no record at that time, because I was pushing the development work straight on through, attempting to block out ore. I did not find anything encouraging in the first five or six hundred feet. It was rather discouraging, but the further in we went, it seemed there was an indication

(Testimony of P. G. McKenry.)

in there that the vein might widen and there were certain places in there where I had to put timbers in to keep the vein matter in place. Those were in the lenses. [338]

The ore up in that particular little mine comes in lenses and it swells and squeezes. It will run along maybe for 12 or 15 feet with only a streak on the wall, and it might come out to 2 or 3 inches and it comes out and makes a little body of ore, and then it squeezes back again. That is what I consider a lense. It is a body of ore in the vein.

I believe it was somewhere in here (indicating). I went right on through here (indicating) to this point (indicating). I had them cut a station in there at that time and drive this cross-cut. I did not find any ore in the cross-cut, it was through the hanging wall, and it was granodiorite, blocking and very tough with no vein showing.

I expected, with an extension of 25 to 30 feet on that vein, to come into a vein known as the back vein of the property. I didn't expect any ore until I contacted the back vein.

I did not do any work on the mill tunnel. The mill tunnel was showing this stope when I went up there and it was my recommendation at that time that I would pull a rail from the cross-cut down here, inasmuch as they didn't want to go ahead with it against my wishes and put the rail up here and drive ahead, because the ore—I had been up there and prospected it, and this little stope had shown

(Testimony of P. G. McKenry.)

there, had been a little ore in it, although it had been stoped out, although it was only 4 inches, it had shown indications of coming into another body of ore, that is, another little [339] lense or shoot. Later on I understood that they did go into some ore up there, but I wasn't there at the time.

This here is known as the Pine Tree shoot, Pine Tree tunnel. They considered it at that time when I was up there in 1934 that there was an ore shoot coming down just about like this (indicating), and I believe that this probably was put in here as a bottom extension of this shoot.

This little green portion says "probable ore" with a question mark. If there were a shoot above there, I believe that whoever made this map would presume that that shoot would extend in this section.

In making my sampling I cut a channel sample across the face about four inches wide and about four inches deep. And the reason I took the samples that way is because I found that the values were so erratic in it in taking the samples that I had to take large samples to get an average.

With regard to cutting samples to a uniform depth of about three-fourths of an inch, I wouldn't consider that would make a good sample in this mine, because I don't think you would have enough volume of rock there to give you a good sample. The values are so erratic that the more volume you could get the better average you could get out of that. I know that in the past I cut some samples

(Testimony of P. G. McKenry.)

up there that ran 70 cents and five feet further it would probably go $11 or $12 and then back to a trace again. I was always trying to get enough volume in there so if there were any galena or anything like that showing [340] in the rock, we threw it out.

There was seepage of moisture through the walls of the tunnel. The mine has been making a little water. As to the effect of that seepage upon the ore in the top of the tunnel, if it was silver it would leach, but if it were gold, gold doesn't leach by the waters, but if the gold were contained in a sulphide or some other material, such as galena—if gold is around the galena, the water may have a tendency to leach the gold loose so it would drop to the bottom of the floor. If it did that, then you would have a concentration on the floor of the tunnel.

As to whether it would have anything to do with taking a sample four inches deep instead of three-fourths of an inch deep, it all depends on the type, how the gold or the sulphides were lying in the rock. If it were just penetrated, that is, all the way through, then you would probably get a better sample, if you cut deeper.

I last saw this mine in March of 1941. The ladder was pretty rotten. There was ventilation. It was just breezy at the portal of the tunnel. When you opened the door you could feel the breeze come out.

(Testimony of P. G. McKenry.)

I couldn't sample the mine right now. The mine is practically caved in. That is, from about 650 or 700 feet on into the mountain.

The upper level, also known as the mill tunnel, is caved in and is quite dangerous. I could make an accurate, scien- [341] tific sampling at the present time of that portion which is open, but it wouldn't give me an idea of the entire mine. I would go to the extensions there or depths where ore is found in larger quantities.

When I tested the mine myself I found some free gold. I found that the so-called iron pyrites or the sulphides up there carried value.

I also found that there is considerable galena in certain spots, and wherever the galena shows the vein matter becomes much higher in value.

I also found that the vein in various places carries arsenical pyrites. Even the water that comes out of there, the men don't drink it because of the arsenic in the water.

As to my knowledge of the mine during the years 1938, '39 and '40, I have made several trips in there and have spent considerable time, and the reason that I did that was to satisfy myself as to the value, if any, of the property. I didn't go down into the property and sample for myself again, although I had a copy of Mr. Sampson's map I intended to check his samples at a later date when the mine was reopened. I spent considerable time with Mr. Barnwell in Mokelumne Hill, who had an assay book with

(Testimony of P. G. McKenry.)

about 1500 assays. It seems that he was assayer employed by the company. He offered to give me a copy of the assays—he considered it a very good little property from the samples that he had run in his laboratory. [342]

It was my plan to re-open the property and verify Mr. Sampson's report, and also to find the likely spot in which I could go to work. With that in view I spent in the last year or so about $1,000 or more.

(Map exhibited)

I have a copy like it.

With reference to the probable value of ore bodies on this mine, I would say that the map would be rather enthusiastic. I made an estimate of the tonnage of ore that has been milled from this mine since I first started. I did that last year when I was up on the property for myself. I don't know how much was milled—I wasn't on the property at any time during the time the mill was operating—I had taken what I considered the average width as I had known certain portions of it in the past, I figured how far the rise had gone up—most of the rise was up to 90 feet—I figured that if that had been on a foot and a half width, that they had mined and milled, and there would have been approximately 5600 tons. I have no way of knowing what had been milled.

This district is known as the Glencoe mining district and not the West Point mining district as this

(Testimony of P. G. McKenry.)

map shows, because West Point is across the Mokelumne River about eight or 10 miles distant.

In this particular locality adjoining this property on the east is a property known as the Blue Bill Mining Company. There is no mill on the property but there has [343] been considerable development work done there.

The south of this property about a quarter of a mile is a property known as the Good Hope, I understand $375,000 has been taken out of it to a depth of 300 feet.

To the west of it is a property known as the Valentine Mining Company. It is owned by a group in San Francisco, and I don't think they have mined there since 1910 or somewhere along in there.

On top of the hill there are several little properties operating, and they are taking their ore to a custom mill located about seven miles from these various properties. One of them is known as the Mexican mine.

In my opinion, if properly managed, this property would make money, and that would depend on the type of ore bodies found by additional development work. In my opinion, it is probably of a character that would justify the expenditure of additional money,—development money.

It is hard to say how much I could make if I got into the mining. I would have to change the mill design considerable up there also.

(Examining document) This is where the ore

(Testimony of P. G. McKenry.)

comes in, and comes down through the grizzly here into this far bin, then into crushers. They have a six-inch jaw crusher there. And then it goes into a fine ore bin below—the fines, however, go right through—and from there there are two batteries of stamps of five each, ten stamps, and one of the feeders [344] up there is an automatic feeder and the other is a belt feeder.

There are two plates at the back of each battery stamp, or one plate back of each battery—two plates—and then from there it feeds into three Denver sub A flotation cells.

Then the settling tanks are over here and the tailings go off down the river.

It is an open circuit mill and the type of ore that has been going through there I think necessitates a change, if I had the property I would put in a ball mill classifier, a small ball mill classifier, put a sump out there so I could pump back and hold the values because the way the thing is designed, if the gold gets away from you, it goes down the side of the mountain and you never can recover your tails, and I believe that some values did get away because I ran some tests on some tails that ran $53, according to Mr. Barnwell's assays.

The air compressor is an upright Sullivan, and is capable of throwing about 750 to 800 cubic feet. It is about seven feet tall.

There is one Buda Diesel, 90-horsepower, attached to—with the Marwood pulleys, B belt drive. That

(Testimony of P. G. McKenry.)

is a 90-horsepower Buda attached to the air compressor. The mill was run with a 25-horsepower horizontal Fairbanks-Morse semi-Diesel, and that Diesel is torn apart down at the bottom of the mill. The heads are off of the Buda also in the second [345] floor.

There are times where your values will come in at a lower depth or may be higher up in the mine. That is due somewhat to the way that the gold was distributed, of the weakness when the land was hot and the descending vapors came through in the secondary enrichment, they would find a weak point to ascend. There have been mines that the deeper you go, the more the values are.

I didn't give up because I had gone into the upper levels up there and found that it would warrant further development in the bottom, and when that wasn't done in accordance with the way that I thought it should have been, then I left the company.

Cross Examination

I graduated from Stanford in '26. I was working at accounting before I entered Stanford. I took a mining engineering course at Stanford.

After that I have been working most of the time as an accountant.

A horse coming into your vein means a disturbing element that breaks it up.

LOUIS R. JACOBSON

a witness for the defendant, testified as follows:

Direct Examination

As to United States Exhibit No. 97, Consolidated Mines of [346] California profit and loss statement of mill operations 1934 to 1938 as per record of Frank S. Tyler and records of Consolidated Mines of California.

In considering the heading here as profit and loss statement, I would say that it is not a reflection of the operations of the mine as a profit or loss.

There was included on this statement for the years '33, '34 and '35 losses aggregating $45,000 which I say were incurred primarily in the development of the property under Frank S. Tyler's original agreement, and under no circumstances would it be included in the preparation of a profit and loss statement.

If the corporation had started off as of January 1, 1933, say, in those three years I would have included it as development expenses and capitalized it.

The year 1936, that would be a correct reflection of the operations of the property. There is nothing that should be charged to development for '36 because we did take a certain proportion of the operating expenses for '36—I think to the extent of $7500—and capitalized it as development expenses.

In '37, however, there was no charge made to development account, everything being charged off to expense.

(Testimony of Louis R. Jacobson.)

This schedule, Exhibit 95, may not be considered as showing a profit or the profit and loss.

The heading of this statement says "Showing Net Profit [347] From Sales of the Monolith Stock, Consolidated Mines Stock, Sold for Cash and Cash Taken in in Tyler Agreement."

Under receipts for the year '36 it shows an item of $8,050, Pledgor & Company Loans. There is no reflection on this statement that those receipts were obtained from any stock sold. There were considerable dealings between W. J. Shaw and Pledgor & Company, and he did make loans from them at various times. I couldn't construe this particular item as being a proper showing in the profit and loss statement.

As to Mr. Shaw's private deals, Under Monolith stock sold for '34 and '35 and '36, from this statement we can't determine what part of those sales would be represented by any of the considerations turned in on the Tyler original agreement or from the sale of Tyler's personally owned stock. It is an indication here on this statement which shows that there stock purchased outside of these mine deals in 1935 to the extent of $8,301.41 for expenditures. Now, the sales thereof would be reflected under receipts, and my recollection of those various accounts is that there were some private deals entirely apart from the Consolidated, and the mere fact that there was a disbursement made for Mono-

(Testimony of Louis R. Jacobson.)

lith stock sold indicates that they were private deals.

I have in mind two such private deals. Mr. Pitcairn's stock. It is quite a block of Midwest or Monolith Portland Cement stock; and also Mr. H. U. Baker. I think he turned in some stock and made some private deals. There were a number [348] of private deals now and then.

If Tyler or Shaw bought any of that stock, it would be reflected under disbursements in the amount of $8,301.41 in the sale thereof, would be reflected under receipts, and if we knew how much is received for that stock, as shown under receipts, we would know what profit was made on that particular deal or deals.

There are some other schedules in evidence that would indicate the profit made on the deal.

I would say United States Exhibit 96 is not a correct statement of the actual amount of moneys spent at the mining properties.

I would add to that, if we take into consideration the moneys that were received by the mine itself during the period from '36 to and including '37 upon the mint receipts, they should be properly added to that, because practically all disbursements were made. There was no balance left there in the bank account. So we presume that this money, plus the moneys that were received from any other sources, would have been expended for the account of the mine.

(Testimony of Louis R. Jacobson.)

There is about twenty-four or twenty-five thousand dollars they got from the operation of the mine itself. That would make in the way of expenditures on the mine $106,000.

Mr. Shaw never examined the books. He did not direct any entries in the books.

During '35, '36, I can't say how many, but there are a [349] number of stockholders *number of stockholders* that came in to see Mr. Shaw. I recall one incident in '35 that I brought to his attention where Mr. Shaw checked on the salesmen as to the representations that they made. Mr. Shaw and I were alone and were conversing about it.

After I told him about the incident, he came out and talked to the salesman, or called the salesman in the room and I was present with the salesman at the time. I don't recollect who the salesman was. He worked under Charley Wohlberg.

That particular salesman was calling up a numfer of Midwest stockholders and using what I considered to be pretty strong tactics in persuading them to turn the stock in. I went and told Mr. Shaw about it. Mr. Shaw immediately went into the room that I was in, or we went in together in his room, and he told him he had to cease using those tactics.

With respect to office use and a stenographer, my recollection is that there was a fixed monthly charge against the corporation of $150 per month, which included all expenditures. There was no charge ever

(Testimony of Louis R. Jacobson.)

made unless it could have been included in that $150 for services I rendered to the corporation.

There are entries on the books indicating that engineers were paid by the Consolidated Mines.

The records in the black book would also indicate that payments were made directly either by W. J. Shaw or Tyler to Reed Sampson particularly. [350]

Tyler and Shaw did not charge their traveling expenses to the corporation, going to and from the mine.

As to legal advice obtained by Mr. Shaw and Mr. Tyler in regard to the permits, conversations were made with Mr. Guy Graves. I had a few with him with respect thereto, particularly in obtaining the third permit.

The question arose there at one time whether or not we were correct in our assumption.—I say "we"; I was in the discussion on it—in trying to sell Tyler's stock over state lines, and we took that matter up with Mr. Oscar Trippet, although I am under the impression that Syverson was also in on the conversation—Syverson of the office of Haight, Trippet and Syverson—and we took their advice.

The third permit, of course, was issued to correct the second permit.

The matter was brought to the attention of Mr. Shaw and he requested that I take it up with Guy Graves, and Tyler was along with me at the time.

I took the position, after reading the second permit and also taking into consideration the partner-

(Testimony of Louis R. Jacobson.)

ship agreement, that I felt that the stock should have been issued as original stock directly to Tyler to the extent of his interest and to the individual members of the partnership agreement in accordance with their interest—no, I will change that.

The Corporation Department took exception to the manner in which the stock was issued. That was issued all to [351] Frank S. Tyler, and those individuals out of the original permit. They required that we recall that and issue one certificate directly to Frank S. Tyler for the whole 150,000 shares.

I took the matter up with Guy Graves at the time and told him that we could save an additional $1800 in stamp tax because we would have to reissue it from Frank S. Tyler's account to those individuals by asking the Corporation Department to give us a permit authorizing us that the original stock be issued 60,000 to Frank S. Tyler and 90,000 to the individuals, and we would save thereby $1800.

On the exhibit attached to W. J. Shaw's income tax return for 1936 there is an item of $2400 for revenue stamps attached to—"Stamps paid to be applied to Consolidated stock certificates. Income from sale therefrom reported under capital gains, line 10, in the amount of $2400."

No charge was made against the corporation itself for revenue stamps for this purpose.

With respect to personally-owned stock, the only impression I had was with Mr. Syverson, as I recollect, as to whether we had the right to sell Tyler's

(Testimony of Louis R. Jacobson.)

stock over state lines, or whether or not we were evading the Securities and Exchange Act, which was quite new at that time.

Now I say Mr. Syverson—I am not certain whether it was Mr. Syverson or Mr. Trippet (they were both doing work for Mr. Shaw at the time, or had been doing work for him)—and [352] their opinion was that if they were not originally issued stock or if the corporation was selling the stock directly, or Tyler wasn't financing the property out of the receipts therefrom, that he could sell the stock just anywhere over state lines, use the mails, and so forth.

As to any advice from the regional director, I don't recollect—I have a faint recollection—I wouldn't say "faint recollection"; I know that he sent Charlie Wohlberg, or in company with Tyler, or whoever it may have been, sent Charlie Wohlberg to Wyoming or, I believe it was, Salt Lake, and he bumped up against the director there in regard to the sale of the stock. Now, whether Frank Tyler was with him or not, I don't recollect.

I do recollect a letter that Charlie Wohlberg brought in with him, or was mailed to the office, in respect to selling over state lines and not bumping up against the Securities and Exchange Act.

I have no recollection whether the regional directors of San Francisco and Los Angeles were inquired of. I know it was one state in particular that stands out clearly in my mind. There were transac-

(Testimony of Louis R. Jacobson.)

tions which were cancelled at the suggestion of the director in line with that letter that Charlie Wohlberg had.

I think they were returned to them, a considerable amount of Midwest or Monolith stock, which it was felt that we would get into difficulty if we attempted to make those sales. [353]

The company got the moneys to operate during '36, '37 and '38 from mint receipts and also from advances made by Frank S. Tyler and/or Shaw. Mr. Shaw advanced, according to the records, $35,000 from February 1, 1936, up to the present time.

There was a discussion as to what was to become of these moneys that had been advanced by Mr. Shaw. There had been advanced at that time approximately $19,000. Present at the discussion were Tyler, Morgan, Shaw and myself. The question was raised as to what would become or what would be done with the moneys that the corporation owed Tyler or Shaw. Mr. Shaw made the statement to us that so far as he is concerned we might just as well write it off entirely and see the corporation go along.

With respect to the work that was being done up at the mine, I received letters from Mr. O'Shea. I had known Mr. O'Shea prior to the time he was engaged by the Consolidated Mines, and at that time Frank S. Tyler was away from the office for a number of months. Mr. Shaw was away a good deal

(Testimony of Louis R. Jacobson.)

of the time, too. Mr. O'Shea was requested to write as frequently as he could—weekly if possible —giving the progress of the mine. He addressed those letters to me. He might just as well address it to the corporation.

I knew there was a shut-down for a while. It may have been after I had left the company and had been told about it. I am not sure. [354]

(Examining documents) I would say that is O'Shea's signature. Those are addressed to the company.

I saw at times my handwriting and I knew it was requesting that we pay certain bills, and I marked over the name "Paid" right across each one of those. Some of those are not marked and have not been paid. So I must have seen that letter.

I do not have any of the original letters that he wrote me.

I left the early part of '37. It might have been around May or June.

Mr. Montgomery: A letter of 7-21-37, and I might merely mention the particular item that I wanted there, "The average to date is $14.75."

And the next one is 7-30-37, and he said, "With 15-stamp mill we could really make some money."

And the next one is 8-5-37: "Mill heads are running about $17 and the mine is in good shape and there is no difficulty keeping the mill supplied with ore despite the trouble we had with the compressor."

(Testimony of Louis R. Jacobson.)

(The documents referred to were received in evidence and marked "Defendant's Exhibit I.")

Cross Examination

I was not in the courtroom when Mr. Hughes testified. As to Exhibit 97, I don't say it is not a correct reflection from the black book and the Consolidated Mines of [355] California. Nothing is missing on this schedule that should have been taken from the black book or the books of the corporation. The only statement that I made was that it is not a reflection of the profit and loss of the property from 1933 to 1938. I am saying it from accounting principles. I am taking the position that for the period 1933 to '35 that all those expenditures were preliminary, organization expenditures. Other businesses when they spend money and have no income of any kind, they are capitalized over a period of years, and they would be written off. It is a matter of setting it up properly. One is a capital item and the other is an expense item. It is two different matters pertaining thereto.

Where you are spending money to develop a mine, every dollar that you are spending, you are adding to your ultimate value. Therefore, it is wrong to set it up as an expenditure and show a loss during those years when you are really developing.

Exhibit 94 that reads "Schedule of Cash Receipts and Disbursements of Frank S. Tyler (as Per Black Book)," covers the years '34, '5, '6 and '7,

(Testimony of Louis R. Jacobson.)

and also covers the disbursements. I see nothing wrong in making the statement that that is a compilation from the black book.

With reference to Exhibit No. 95, only to the extent that he says "showing net profit from sales of Monolith stock," and, as I mentioned before, there is an item on here under "Receipts of Loans" as a receipt. One would have to take it from the books as they find it and make proper captions of [356] *of* those items, show what was absolutely received and profits, and then loss, and so forth.

I don't think you would find in the stock certificate ledger an account for a Mr. Pitcairn. I don't think Pitcairn ever became a stockholder.

I made the statement that those schedules would reflect the private sales of Frank S. Tyler and W. J. Shaw that had nothing whatsoever to do with the mine deals.

Now, Pitcairn only came in on the original partnership agreement—came in on the deal, and later he wouldn't go in on the deal and sold his stock to either Tyler or to Shaw. That would not balance off. No Consolidated stock was ever sold to them. They disposed of their Monolith stock.

H. U. Baker did not become a stockholder in Consolidated Mines. The same answer and explanation would apply.

There are quite a number of deals, and I don't recollect their names.

I kept the books to the best of my ability.

(Testimony of Louis R. Jacobson.)

Redirect Examination

I gave the gentleman from the S. E. C. all the cooperation I could, the Securities and Exchange, and also Mr. Norcop, to the extent of coming down at 7:00 or 8:00 o'clock in the morning and working all hours at my own time, and even to the extent of coming down without a subpena from Phoenix.

I am making this statement because I don't want to leave any implication that I have tried to straddle a fence. I am [357] just a witness on both sides.

W. J. SHAW

a witness in his own behalf, further testified as follows:

Direct Examination (Cont'd)

(Examining letter) This is the letter we got out to the stockholders. It was not signed by anybody in particular. Just sent out as a letter of the committee and then the stockholders were supposed to sign and return it. There was a stockholders' meeting held subsequent to the sending out of this letter of December 22, 1933.

(The document referred to was received in evidence and marked "Defendant's Exhibit J.")

I attended that stockholders' meeting and did some talking at it.

(Testimony of W. J. Shaw.)

2,828 shares, as shown by the stock ledger, is not all the stock that Mrs. Shaw owned. As to how she came to own stock that is not in this ledger, stock that I purchased, and also 10,000 shares of the Gilbert stock that I took back. She owned about 30 per cent of the outstanding stock, which is around about 45,000 shares. There is 150,000 shares out, and she owns about 45,000 or 46,000 shares.

I have expended money on the mine since it was closed down. I think the mine closed down in December 1937. I put up the money for the assessment work for '39 and possibly for '38 and for 1940 H. U. Baker, the vice-president and substan- [358] tial stockholder, advanced the money there to keep things in shape and do the assessment work.

And the three or four men that we have working there now, Mr. Baker advanced the money for that. They are cleaning out the tunnels up on the mine at the present time. They are working there now.

This money that I have advanced amounts to about $4400. That includes about $700 or $800 attorneys' fees, about $900 assessment work, $1810 of claims that we paid off, which left a total of $1250 which is all there is against the property now—it is clear and paid for—and $287 or something near that for parts for the Diesel motors. And there were traveling expenses up there for Mr. Baker.

And then the moneys that I advanced to take care of the corporation from the time that it was shut

(Testimony of W. J. Shaw.)

down up to just during the assessment work and the things that I have just referred to. It might run up a couple or three thousand dollars. In addition, there was $500 to Mr. Rowe, I put that up when we put him in charge of the property. In June or July of 1937 Mr. Rowe was appointed as assistant to the president and consulting engineer in full charge. He accepted that position. I have seen a letter in which he has stated that he was such an engineer. I have a photostatic copy of it.

I know Mr. Rowe's signature. That is his signature.

(The document referred to was received in evidence and marked "Defendant's Exhibit K.") [359]

Mr. Montgomery: This is dated June 17, 1937: It says:

"I am going over to McKisson in a few days, then I will know more about it then"——

that is the other property.

"more about it then. I am consulting engineer for the Consolidated. They have a good man now in charge, Mr. O'Shea, and the mine has started making money."

(By the Witness):

With respect to the selling of personally-owned stock of Mr. Tyler, Judge J. Hatfield, when he got the permit, told me personally that Mr. Tyler could do anything he wanted to with his personal stock.

(Testimony of W. J. Shaw.)

He could trade it, for instance, and he said if he wants to give it to a taxicab driver, he could. Oscar Trippet and Oscar Syvertson of Haight, Trippet and Syvertson, told me practically the same thing. I took advice from the attorneys I just mentioned.

We went to the Regional Director at Denver Colorado. There is a Regional Director of the S. E. C. there.

We followed the advice just the way they gave it to us. Outside of Mr. Tyler going to Colorado and making his own personal deals, the Securities and Exchange held there that he could do that, but he could not employ some broker to sell the stock for him. But he did do business in that state.

Cross Examination

I don't know the name of this Regional Director in Denver [360] that we talked with.

It was around in '36, maybe '35. I was not in Denver myself.

The conversation was held by the attorney, Mr. Wohlberg, and then a copy of the letter that the original director signed, or a copy of his opinion, was forwarded to the office here, that is, my office.

I didn't personally have any conversation with any regional director of the S. E. C. at any time on this stock issue. I can give you one of those records or opinion that we received from the S. E. C.

(The document referred to was received in evidence and marked "Defendant's Exhibit L.")

(Testimony of W. J. Shaw.)

DEFENDANT'S EXHIBIT NO. "L"

"L. WARD BANNISTER
Counselor at Law
801-7 Equitable Building
Denver, Colo.

June 19, 1936

Air Mail

Mr. J. W. Shaw,
634 South Spring Street,
Los Angeles, California.

My dear Mr. Shaw:

Your telegram of June 19th just received asking the result of the hearing on the Tyler situation and how to proceed with the transaction.

The Director of the Securities Commission, at the hearing held yesterday, said that the only way Tyler could proceed lawfully would be by returning all of the cement stock to those from whom purchased, taking receipts therefor, then, while in the State of Wyoming, explain to those same people the condition and standing and operations of the mining company and then re-trade the mining stock for the cement stock. The Director was also of the opinion that no broker or agent or employee of Tyler could take any part in bringing about a re-trade but that Tyler would have to do it himself and while in the State of Wyoming. Of course if there are trades to be made in the State of Colo-

(Testimony of W. J. Shaw.)

rado, then, according to the Director, Tyler would have to come into the State and after rescinding the present trades begin over again.

The Director was of the opinion that the law had already been violated by the transactions in Wyoming and that prosecution would lie, but he is not disposed to make any trouble providing from now on the law is observed.

All of the foregoing is the situation as it was at the end of the hearing and as it was up to last evening, but, this morning the Director received a letter from your own Los Angeles Securities office to the effect that your San Francisco Securities office, whereof the Los Angeles Office is a branch, has been investigating the mining company and Mr. Tyler's relations with it and has reached the conclusion tentatively at least that Mr. Tyler is an 'underwriter' within the meaning of Section 4, Paragraph 1 of the Securities Act and that, therefore, he is not entitled to have his transactions with the Wyoming Cement Company's stockholders ex*cpt*ed from the general prohibitions of Section 5 above referred to, and not being exempted, would be *bio*lating the Act by making a re-exchange through the mails or by bringing mining stock into the State by automobile or otherwise or by taking the cement stock out of the State by mail, automobile or otherwise. The reason that Mr. Tyler is regarded as an 'Under-

(Testimony of W. J. Shaw.)

writer' by the Los Angeles office and now tentatively by the office here, is that he falls within the definition of an 'underwriter' contained in Section 2, Par. 11 where an underwriter is defined as 'any person who has purchased from an issuer with a view to, or sells for, an issuer, in connection with the distribution of any security *of* participates or has a direct *of* indirect participation in any such undertaking * * *' The Director here, and I believe he said the Director in Los Angeles, is of the opinion that Mr. Tyler took the mining stock from the mining company with a view to its distribution, in other words, its general sale, in which event he, according to the definition is an 'underwriter'.

Now Section 5 contains the general prohibition against the use of the mails or interstate commerce for the purpose of selling or buying securities. Section 5, Par. 1 above referred to exempting transactions 'by any person other than an issuer, *underwriter,* etc' does not exempt Tyler because, according to the Director, Tyler acquired the mining stock from the mining company with a view to its distribution or re-sale to the public or to segments of the public, all of which, according to the Directors, is the same thing.

All of the foregoing represents the view and opinion of the Director at the present moment. According to that view or opinion there really

(Testimony of W. J. Shaw.)

is no way in which Tyler can proceed, except by bringing about a registration of the securities in the manner required by the Act. The Director also added this morning that the thing for Mr. Tyler to do, and his attorneys, is to go right to the Director in Los Angeles or San Francisco, and give the Director full information as to when the mining company was incorporated and when Tyler received the stock and whether the stock was acquired by Tyler with a view to its sale to the public or segment of the public, or whether he had at the time of acquiring the stock no such thought in view but rather of holding it and like anybody else probably meaning to sell it some time or other.

The Director here says this question of whether a person buys with a view of distributing the security is a question of fact and that one may buy with such a view or without it. If Tyler bought without it then our Director is still of the opinion that Tyler could go personally to Wyoming and after returning the cement stock take it back again by again giving for it the mining stock.

I wired you this morning as per confirmation enclosed. Your telegram does not indicate that you received it.

I recommend that Mr. Tyler and his attorneys get in touch with the Los Angeles or San Francisco Director and after acquainting the

(Testimony of W. J. Shaw.)

Director with all the facts of the situation find out what course would be agreeable to the Los Angeles or San Francisco Director. That is what the Denver Director suggests when he said 'See the Los Angeles or San Francisco Director and get a clearance'.

At Mr. Wohlberg's request we investigated our own Colorado Blue Sky Law and believe that as far as the State law is concerned Mr. Tyler could come into Colorado and while here make his stock exchanges. That is not to say, however, that he would not be violating the Federal law.

We have also just today and at Mr. Wohlberg's request, started a search into the Wyoming law to see what the law of that State would permit and are rather inclined to believe that the matter could be handled there in a way that would not violate the Wyoming law.

As to the laws of both of these states, however, it would be necessary to work out an exact method of proceeding. We finished our investigation of Colorado but not all of the Wyoming law when we received the message from the Denver Director and were informed by him of the developments in Los Angeles and San Francisco. In view of these developments I think it would be best to suspend work here until I hear from you, Mr. Tyler or Mr. Wohlberg further from Los Angeles.

(Testimony of W. J. Shaw.)

I have just talked with Mr. Wohlberg over long distance telephone at Cheyenne and have told him of today's developments in Denver. He will be leaving tonight for Los Angeles.

I shall be out of town Saturday noon to Monday morning.

Very truly yours,

(Signed) L. WARD BANNISTER

LWB:F''

(notation written on bottom of letter):

"According to Denver Director there is no escape from re-delivering the cement stock. Receipt should be taken for it."

(A letter of June 22nd offered)

(The document referred to was received in evidence and marked "Defendant's Exhibit M.")

(Testimony of W. J. Shaw.)

DEFENDANT'S EXHIBIT NO. "M"

"L. WARD BANNISTER
Counselor at Law
801-7 Equitable Building,
Denver, Colo.

June 22, 1936

Mr. W. J. Shaw,
634 South Spring St.,
Los Angeles, California.

My dear Mr. Shaw:

Re: W. J. Shaw

Mr. Wohlberg telephoned me from Cheyenne Friday evening or Saturday morning, I have forgotten which, saying that he had received a letter from the SEC in Denver saying that the Director would like to talk with him and wanted to know whether I thought he, Mr. Wohlberg, should go on to Los Angeles. I told him of the Director's new decision to the effect that he did not believe Mr. Tyler could go personally into Wyoming and also advised that I thought he could return with safety to Los Angeles. Today, and at Mr. Wohlberg's suggestion, I saw the Director, or rather his attorney, Mr. Garrity, and told him that Mr. Wohlberg had gone on back to Los Angeles but that he was perfectly willing to make an affidavit any time concerning what he had done in Wyoming on his trip. I may add that Mr. Garrity seemed satisfied.

(Testimony of W. J. Shaw.)

Saturday I wired you to the effect that I would write you today saying why the Director thinks that Mr. Forbes violated the Security Act. His line of reasoning is that since Section 5 prohibits any person from making use of the mail and transportation facilities for the sale and purchase of securities and since under the definition of Section 2(12) Mr. Forbes is a 'dealer' and since 'dealers' are not within the exemptions from Section 5 as those exemptions are set forth in Section 4, it follows that Mr. Forbes has violated the Act. The foregoing is the opinion and the grounds for it, of the Director and his attorney here in Denver as to Mr. Forbes.

Now returning to Mr. Tyler again. The Director and his counsel, Mr. Garrity, take the view that if Mr. Tyler bought as an investment and not with a view indicated at the time of resale that then Mr. Tyler could go in person into Wyoming and in making an exchange of stocks would not be violating the Act; the theory being that he is simply an ordinary person, not a 'dealer', not an 'underwriter' and not an 'issuer' and that since he is neither of these he is within the exempted class of 'any person other than an issuer, underwriter or dealer'. In other words, he is one of the 'any persons' who are exempted when not 'issuers, underwriters or dealers'. If, however, Mr. Tyler bought with

(Testimony of W. J. Shaw.)

a view of reselling, then according to the definition of an 'underwriter' found in Section 2(11) he would be an 'underwriter' and not within the exemptions allowed by Section 4(1) to persons other than 'issuers', 'underwriters' or 'dealers'. If he is an 'underwriter' then whether he conducts the business of exchanging the stock from his office in Los Angeles or goes in person to Wyoming he is not within the exemption referred to found in Section 4(1) and accordingly would be a violator of the Act. Such is the reasoning of the local SEC office in Denver.

I have already put in a *bood* bit of time on this problem and could put in several hours more looking up what decisions have been rendered whether judicial or administrative under the Securities Act, but since the Los Angeles and San Francisco SEC offices are now in the picture, and since, therefore, you may want to deal with them, it may well be that you would want your own Los Angeles attorneys to do the research work if more is to be done. My own idea is that as a practical matter it will be well for your Los Angeles attorneys to get in touch with the Los Angeles SEC office. Possibly they can reach an understanding with the local office as to facts which would still make it possible to find a way for Mr. Tyler to go into Wyoming in his capacity as a private investor and make the exchange.

(Testimony of W. J. Shaw.)

There are two or three questions which I should like to ask: 1. When was the Mining Company incorporated? 2. When was the stock issued or disposed of to Mr. Tyler? These are questions designed to enable one to determine whether or not the Mining Company shares themselves are to be considered as exempted securities under Section 3(A)(1) of the Act which exempts from the general prohibitions of Section 5 'any security which prior to or within sixty days after the enactment of this title has been sold or disposed of by the issuer or bona fide offered to the public but this exemption shall not apply to any new offerings of any such security by an issuer or underwriter subsequent to such sixty days'.

Then Section 4 which exempts certain transactions from the general prohibitions of Section 5 exempts 'transactions by an issuer not involving any public offering'. How 'public' the offering has been I do not know but I imagine that it has been general enough to constitute a 'public offering'.

You may want to consult your Los Angeles attorneys about this point. Tomorrow I will give you the references to the Colorado and Wyoming statutes, these, however, would refer to State Law and not to Federal Law.

Yours truly,
L. WARD BANNISTER

LWB:T"

(Testimony of W. J. Shaw.)

(A letter *of 23* offered)

(The document referred to was received in evidence and marked "Defendant's Exhibit N.")

DEFENDANT'S EXHIBIT NO. "N"

"L. WARD BANNISTER
Counselor at Law
801-7 Equitable Building
Denver, Colo.

June 23, 1936

Mr. J. W. Shaw
634 South Spring Street
Los Angeles, California

My dear Mr. Shaw:

Re: W. J. Shaw

* * * * * * *

It is very evident that before a really trustworthy opinion can be given on the right of Mr. Tyler to sell under Federal Law or within Colorado or Wyoming to sell under State Law there must be now, in view of questions raised by the Los Angeles office of the Securities Commission, a careful ascertainment of facts, including: the date the mining company was incorporated; the date when the stock to Mr. Tyler was issued; whether Mr. Tyler bought the stock with a view of reselling it or rather to keep for a time as an investment; whether Mr. Tyler con-

(Testimony of W. J. Shaw.)

trols the mining company; whether, if he does control it, it is through the ownership of the majority of the stock; or whether for some reason aside from stock ownership he dominates the company; whether in any way, direct or indirect, the company is to receive the benefit of any sales made by Mr. Tyler of his stock; what the resolutions of the mining company have to say as to the relations between Mr. Tyler and the company in the matter of acquisition of the mining property from him and issuance of stock to him; what is provided by any contracts between the mining company and Mr. Tyler as to the terms upon which he parted with his mining property in exchange for stock; what the language is of any escrow contracts between Mr. Tyler and the mining company or escrow contracts made by Mr. Tyler under the laws of California; what the relations are, if any, between Mr. Tyler and the committee of the cement stock holders. Now that the Los Angeles office of the SEC has commenced to interest itself, it becomes important to any attorney attempting to advise you, either by your regular Los Angeles attorney or myself, that the facts on the foregoing questions be carefully developed. Mr. Tyler will not want to run foul of the Securities Act of the Government or the Blue Sky Laws of either of the States. At the same time, if there is a way by which he may

(Testimony of W. J. Shaw.)

legally dispose of the stock, that, of course, is his objective.

Since Mr. Wohlberg is now back in Los Angeles and since the Los Angeles SEC has itself been investigating, I assume that your attorneys there will consider your problem as soon as possible. If there is anything further you desire don't hesitate to call upon me.

Yours truly,

(Signed) L. WARD BANNISTER

LWB:T"

(Telegram dated June 19th offered)

(The document referred to was received in evidence and marked "Defendant's Exhibit O.")

DEFENDANT'S EXHIBIT NO. "O"

COPY OF TELEGRAM RECEIVED

"June 19, 1936

W. J. Shaw,
634 South Spring Street,
Los Angeles, California.

Local Securities Director Previously Advised Me That Tyler Could Go Wyoming Personally Turn Back Cement Stock In Order To Rescind Present Transaction Then Take It Up Again By Exchanging Mining Stock Therefor How-

(Testimony of W. J. Shaw.)

ever This Morning Director Received Communication From Los Angeles Securities Office Saying San Francisco Securities Office Has Been Investigating And In Consequence Believes Tyler Took Stock With View Of Distributing Same In Which Event Is An Underwriter Within Meaning Of Section Three Subdivision Eleven Of Securities Act And Therefore Not Eligible For Exemptions Under Section Four Paragraph One And Therefore Subject To General Prohibitions Contained In Section Five Paragraph A stop Director Says Tyler Should Settle Question Of Whether He Is An Underwriter With Los Angeles Securities Office And That He Is Courting Danger If He Goes Wyoming Before Doing So stop Director Here Reports Tyler Absent From Los Angeles Hence Am Wiring You

L. WARD BANNISTER

CHG

Bannister Acct."

As to a letter from the regional director of the S. E. C., I don't think it was signed—the one I got, I think, was more or less an opinion from the attorneys. I think there was a copy of it, however. In fact, I know there was a copy. [361]

We have an opinion from the S. E. C., a copy of a letter.

(Testimony of W. J. Shaw.)

The final Monolith Midwest committee that went to work with the Pacific Bank in San Francisco was W. J. Morgan; C. P. La Grange; and E. S. Harding. Mr. Harding lived about a year after he first started to act. I think Mr. Alexander took his place on the committee.

There was not an executive committee of the Monolith Midwest Protective Committee from the outfit after the bank started to receive deposits. That executive committee was formed practically the same time or right after the other committee was organized.

The executive committee did not come into being about the same time that the Monolith Protective Committee came into being. The Monolith Protective Committee is another committee.

As to the record where the Pacific Bank was closing out after the Midwest settlement, dated October 31, 1936, this is the Monolith Stockholders Protective Committee, but I understood you to say that this was organized at the time that the stock was deposited. There is a Monolith Executive Committee that was organized immediately after the committee that I thought you were referring to was organized.

As to this document winding up the Midwest so that they could close out the Pacific Bank in San Francisco, the signatures are Henry L. Wikoff, M. G. Alexander, Sidney G. Marcus and W. J. Morgan. The committee had not been enlarged to

(Testimony of W. J. Shaw.)

four. Mr. Morgan always insisted on approving and signing, whether [362] he was a member or not. That was the understanding. Those are individuals, those names there, the four. It is typed off. But none of them are the original. Mr. Morgan is the only original member left. That is why he had to sign everything.

As to what is typed on here, "Monolith Stockholders Committee," signed W. J. Morgan, Sidney G. Marcus and M. G. Alexander, that is the Monolith Stockholders Committee.

And then we have the executive committee of the Monolith Stockholders Committee, and those names are the same as the parent committee, but the third member of the executive committee is Henry L. Wikoff. He succeeded La Grange when he died.

As to the necessity for an executive committee, Mr. Morgan said he didn't want the responsibility of signing checks, and he suggested that we should organize an executive committee to do that, which was quite customary.

As to a letter of the Monolith Stockholders Committee dated September 27, 1935, addressed to the Pacific National Bank, 333 Montgomery Street, San Francisco, Mr. George S. Burks: "Gentlemen, upon presentation of this letter kindly release the Monolith Portland Cement stock which is represented by the following certificate of deposit." And one that says certificate 132, number of shares 654,

(Testimony of W. J. Shaw.)

name in which stock is held Seeger and Irma Seeger, and the letter concludes "Thanking you for your kind attention, yours very truly, Monolith Stockholders Committee." The signature is mine. [363]

I was never a member of the Monolith Stockholders Committee, or of the executive committee.

As to a letter dated March 25, 1936, the same stationery, to the same addressee, this bank, the same tenor, which refers to stock of the Schumacher, that is also signed in the same fashion, Monolith Stockholders Committee, W. J. Shaw.

I believe I testified that I was made executive secretary around about this time.

Just for the purpose thought of getting stock released when Mr. Morgan was in Oakland and the other members out of the city.

I never used any title. It was a question of form. The girl would write them out and I would sign them.

The letter of October 29, 1935, on the same stationery to the same addressee about the same tenor referring to stock for James Kruse, giving the certificate number and the number of shares, is signed in the same fashion; one covering the John W. Cline and John Wesley Cline, Jr., is signed in the same fashion and addressed to the same bank.

This one dated September 27, 1934, on the same stationery, addressed to the same bank, relating to certificate of deposit, and showing 40308 pre-

(Testimony of W. J. Shaw.)

ferred, Maria M. D. Craig, is signed Monolith Stockholders Committee by (written) W. J. Morgan, Chairman, and under that the letter "B"; I don't know who "B" is.

As to this one,—the Goodrich people, the Monolith Com- [364] mittee letter dated May 27, 1937, and is signed: Monolith Stockholders Committee by W. J. Shaw.

As to this one on my personal stationery, containing some other shares of Regina Woodruff, dated February 23, 1934, addressed to Lybrand, Ross Bros. & Montgomery, at 510 South Spring Street, Los Angeles: "This is to certify that the following Monolith stock now on deposit with the Pacific National Bank of San Francisco is subject to release for the reason that the 50 cents per share has been paid and under the terms and conditions of the depositary agreement said stock is not subject to any lien."

And her name, among many others, appears for 14 shares.

"Demand is hereby made upon you to release the aforesaid mentioned stock. Yours truly, Monolith Stockholders Committee, W. J. Shaw."

That came in from the auditors. This one is dated October 24, 1934, addressed on the same Monolith Committee stationery to the bank having Patrick F. Murphy for 15 shares, signed Monolith Stockholders Committee, W. J. Shaw, Executive Secre-

(Testimony of W. J. Shaw.)

tary. That is addressed to the Pacific National Bank, release of stock.

As to this one on the same stationery of the committee dated July 30, 1935, addressed to Pacific National Bank, covering certificate No. 239 for 102 shares for Patrick F. Murphy and signed Monolith Stockholders Committee without any typing at all, just W. J. Shaw, it says 300 shares to [365] Herman Cramer and also kindly release to William C. Fastnow Company, brokers.

If any of them sold the stock and wanted the brokers to release it, I released it for brokers too.

This one is October 15, 1934, a letter on the committee stationery to the same bank covering the Garfield Voget, 100 shares of common L. C.-263 of the Monolith Portland Cement Company, signed Monolith Stockholders Committee, W. J. Shaw, executive secretary.

And another one for the Vogets on April 1, 1936, addressed to the same bank on the same stationery, certificate 625, number of shares being 600, and under where it says "Name in Which Stock is Held," "Garfield Voget and Rose A. Voget," those are representing, according to the letter, Monolith Midwest preferred stock; that is, certificates of deposit representing that stock, and that is signed Monolith Stockholders Committee, W. J. Shaw, and then typed under there, W. J. Shaw.

The Pacific National Bank of San Francisco, depositary, did decline to release certificates of de-

(Testimony of W. J. Shaw.)

posit for either Monolith or Midwest on my signature and demand. That was just before I had written authority from Mr. Morgan, a member of the committee, it would be all right to release the stock with my signature.

As to Exhibit L; Exhibit N; Exhibit O; pertaining to the discussion about what the regional director in Denver of the [366] S.E.C. had to say on the proposition,—whether that was the last advice we received on the subject. I think we got some advice from the Regional Director of San Francisco. I believe that advice came through Raymond Haight or Oscar Trippet.

The Court: It has been stipulated that it (the stock of Consolidated Mines) wasn't registered in the S.E.C.

As to an assignment by Mr. Tyler to me—of Monday, July 1, 1935, I suppose I received the original of it from Mr. Tyler.

Mr. Norcop:

> "For and in consideration of the assistance rendered to me by W. J. Shaw in the formation of that certain mining partnership entered into between myself and sundry other individuals under date of February 6, 1934, and for certain cash advances made to me for other considerations received, I hereby assign to W. J. Shaw, an eighty percent (80%) interest in any and all net income to be realized from the consideration received by me out of said partner-

(Testimony of W. J. Shaw.)

ship agreement, and from the net capital stock I am to receive as my forty percent (40%) interest in the corporation formed, namely, the Consolidated Mines of California, when such stock shall have been issued to me as and when authorized by the Corporation Department of California.

"It is understood that under the above-mentioned [367] partnership agreement I have incurred certain expenditures in the development of the mine properties, the amount now being in excess of $35,000.00; and that I have still to expend additional sums before I shall have fulfilled my part of the agreement; all of which is in accordance with said partnership agreement. The amount to be expended is, at the present time, undeterminable, and will be based on the Engineer's reports, etc. The net profits are, therefore, to be arrived at only after all the terms of the partnership agreement have been fully performed.

"It is understood that the stock of the Consolidated Mines of California, to be issued to me, is to stand on the books of that Company, in my name, but I will, on demand, authorize the transfer of said stock to W. J. Shaw or his nominees."

By the Witness:

As to exhibit No. 37, my income tax return for the year 1935, I couldn't give you any information

(Testimony of W. J. Shaw.)

about income tax. I signed it, and it was made up for me by Mr. Jacobson.

As to whether Mr. Tyler and I carried on thereafter with reference to the Tyler partnership agreement and in accordance with this assignment that he made to me, I couldn't answer that. I believe we had some other understanding once [368] or twice besides that, but I don't remember of any other agreement signed up. It might have been, though.

As to my income tax return of 1936, Exhibit No. 38, I see it. I see the last item is—amount paid to Frank S. Tyler as share of profit on sale of Consolidated Mines stock, total consideration received therefor $43,838.05, Frank S. Tyler receiving 20 percent thereof in accordance with agreement and that Tyler's 20 percent is set out as $8,735.60. Is that all charged up—giving Morgan that here, $8,000? He got a whole lot more than that in the year of 1936. I signed this return.

Going back to the year 1934 return, I would not be able to say whether or not that was income from the Tyler partnership agreement. I was buying and selling all the time, probably fifty, a hundred, maybe more of sales in stocks.

On this document marked No. 23, that is my handwriting on page 4. When I presented that document to Mr. Porteous I had no authority, but I was a pretty big creditor at that time, and I went up there to get these properties back because they had forgot to send the regular monthly payment,

(Testimony of W. J. Shaw.)

and they lost them, and I was worried about them and wanted to get them back. That was the middle of October, 1936. I was not a stockholder in Consolidated Mines other than under this agreement with Mr. Tyler, but Mrs. Shaw was. I never was an officer of the Consolidated Mines of California. I hoped to be though. [369]

The agreement between Lytle and McKisson on the one hand, and Tyler on the other, dated the 18th of December, 1933, has my initials on the first page. The "F. S. T. by W. J. Shaw" is in my handwriting. Maybe that "O.K." is, too. The reason [369a] for those initials there was some change made in the body of the document and Lytle initialed it and I initialed it. It goes to the top of the second page, and "O.K. by F.S.T. by W.J.S." is in my handwriting, and signed by Mr. Tyler. That is his signature. Signed by Lytle, McKisson and Tyler.

As to by what authority I was negotiating there with Mr. Lytle under that Tyler agreement of the commencement on the 18th of December, 1933, I was helping Mr. Tyler. He had never had any experience in these kinds of agreements. It looks like I was trying to make a better agreement there than I got. I thought I could get it for cash at that time for less money.

As to this letter dated December 14, 1936, I recall having seen that letter here in the case. It related to these same properties, but this deal didn't

(Testimony of W. J. Shaw.)

go through here. This is a different deal from the one I made on the other. There is only one kind of stock of the Consolidated Mines—common stock. That is my signature, but that deal didn't go through. I didn't mean anything in particular by common stock.

As to a photostatic copy of the signature cards of the California Bank—that is correct.

As to a Pledger check dated 8-7-1935, payable to Frank S. Tyler in the amount of $1,419.72, and on the back of it it has the restrictive endorsement, "For deposit, Frank S. Tyler, by W. J. Shaw." As to whose handwriting that is, first two lines, "For deposit," they are all three mine. [370]

(Original of Government's Exhibit No. 101 for Identification offered, same being a letter of December 19, 1933, addressed to W. J. Morgan, Oakland, California.) Yes. I signed that letter.

> (The document referred to was received in evidence and marked "Government's Exhibit No. 101.")

As to Exhibit No. 104, the matter on the front of two cards,—the top card is in my handwriting in its entirety, and that reads:

> "To W. J. Morgan. You can cancel your agreement with Tyler if I do not accept your settlement with me of date.
>
> W. J. SHAW."

(Testimony of W. J. Shaw.)

And the second card is also in my handwriting. That second card reads: W. J. Morgan, Cash, 1607. Stock, 643." The number of shares he is to put in the partnership agreement and the amount of cash. I gave that a long time ago when we signed up the partnership agreement, that card you have there, on the number of shares. That was given to Morgan a week or in the month before we incorporated.

Government's Exhibit No. 102, undated, bears my signature, the word "Jack." This one on the stationery of the Dos Cabezas Company, Exhibit 103, dated February 1, 1934, bears my signature and my handwriting as a memo.

This letter, on the stationery of W. J. Shaw, dated February 22, 1934, is signed by me. I wrote those three [371] letters, evidently. I signed them. I don't remember them though. I wrote that at the hospital. I kept a little typewriter there at times.

Concerning the siguation that I should not be known in this Monolith Committee until I had collected all the evidence, [371a] that I was working undercover until I had collected all the evidence as chief investigator for the committee to use against the Monolith people. I meant by that, that until I had given the auditor sufficient information to go ahead and get the report, why I would stay in the background. That probably took 60 or 90 days.

Morgan and Harding ran the San Francisco office until the office was opened down here. A. R. Griffith and a man by the name of McIntyre ran the

(Testimony of W. J. Shaw.)

Los Angeles office. McIntyre was just an office man. He wasn't connected with the committee in an official capacity. I took charge of the Los Angeles office for the Monolith Committee after that, put my name in receivership against Burnett in 1932 to get a receiver appointed in Nevada for the Midwest. I came very much out in the open. I went over to Burnett and told him to return the stock and so much cash and I would dismiss the suit and quit.

I know Mrs. Shaw owns 37,000 shares, and I believe she owns around about 40,000, and with that 2,000 shares there she must own around about 47,000 shares.

Wikoff died right after he gave us orders to close down the plant. That was in '37.

I believe Reed J. Sampson, of the State Division of Mines, took Gilbert's job. I understood he was on quite a while.

I base my statement that Mr. Baker is a stockholder [372] because I sold him the stock myself. I don't think W. J. Shaw and Company is a stockholder.

The S. E. C., I understand has had the books. They couldn't be kept up. We couldn't operate without the books.

(There was produced a ledger account, Shaw, W. J. and Company, 634 South Spring Street, Los Angeles, California, June 21.)

It looks like 1937.

(Testimony of W. J. Shaw.)

Mr. Norcop: Certificate 744 for 10,000 shares.

By the Witness: W. J. Shaw has got more assets then than I thought they had. I have never seen any stock registered to them.

Redirect Examination

The Consolidated Mines Company does not owe me any money now. That $37,000 I charged that off. I gave it to them. I said, "Never charge any money to me." They could have it.

As to the reasons for keeping undercover, there were several. First, I had the San Diego Portland Cement Company organized down in San Diego and started building a cement plant down there. It was just some competitors sending out letters trying to say I was trying to get control of this company. Mrs. Shaw, as a stockholder, is on the books there. That stock I brought back there is three certificates I assigned over to her. It has never been transferred.

(A letter was produced.) [373]

(Questions by Mr. Norcop)

The original of this was sent direct to the stockholders.

As to whether we sent any accompanying letter with this one on which I had my signature, there was one letter sent out. Either to that or another one that followed it on another meeting. I don't know whether it was that or not.

(No motion to strike any testimony was made at the conclusion of the trial.) [374]

INSTRUCTIONS TO THE JURY

The Court: All the instructions are written except for some formal instructions at the end, which will be oral.

Gentlemen of the jury, the law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom to exercise this right nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to you, satisfied as I am that you are fully capable of determining them without my aid. However, it is the exclusive province of the judge of this court to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by the judge in these instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with those instructions as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the

indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial, and the law as given you by the Court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion or public feeling. Both the public and the defendant have a right to demand, and they do so demand and expect, that you will carefully and dispassionately weigh and consider the evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The offenses which the defendant is charged with are using the mails to defraud and violation of the Securities Act of 1933.

In this connection you are instructed that the indictment on file herein is a mere charge or accusation against the defendant and is not any evidence of the defendant's guilt and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the wit-

nesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testified; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony or by evidence affecting his character for truth and honesty or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of mistake or inadvertence, but willfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion, and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

The law does not require any defendant to prove his innocence, which in many cases might be impossible, but on the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

The presumption of innocence with which the defendant is, at all times, clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to acquit the defendant unless the evidence in the case convinces you of his guilt as charged beyond all reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case find the defendant not guilty. You cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in

the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

Reasonable doubt is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in his own behalf, his testimony is to be weighed in the same manner and measured according to the same standard as the testimony of any other witness, and the tests for determining credibility of witnesses as given you, in another part of the instructions, are to be applied to his testimony alike with that of all other witnesses.

The alleged artifice or scheme upon which the first thirteen counts of the indictment predicates the criminal use of the mails, being the same in each count, general instructions contained herein will be applicable to all of the counts; and in your delibera-

tions you should apply to each count all of the rules of law that I have given, unless otherwise specifically indicated.

By the provisions of the statute under which the first thirteen counts of the indictment in this case are drawn, it is made an offense for any person, after having devised any scheme or artifice for obtaining money or property by means of false or fraudulent pretenses, representations or promises, for the purpose of executing such scheme or artifice, or attempting so to do, to place, or cause to be placed, any letter, postcard, package, writing, circular, pamphlet, or advertisement, addressed to any person residing within or outside of the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized repository for mail matter, to be sent or delivered by the Post Office Department of the United States.

The offense contains two essential elements:

First: that there shall be devised a scheme or artifice for the purpose of obtaining money or property by means of false pretenses; and, second, that for the purpose of executing such scheme, or attempting so to do, there shall be placed a letter or postcard, writing or circular, in any post office or mail box of the United States, to be sent or delivered by the post office establishment. Both of these elements must be established before conviction is authorized. The words "scheme" and "artifice", as used in the statute, include any plan or course of

action intentionally devised for the purpose of deceiving and tricking others, and thus fraudulently obtaining their money or property. It is not essential to the making out of the charge that the scheme or artifice should have been successfully carried out. Nor is it a defense for a defendant so charged to show that the persons with whom he dealt and intended to deal received some return for an investment of money, or that they would have received some return for such investment. It is essential only that it be shown that the scheme be formed with a fraudulent intent. It is necessary that the government prove that the scheme or artifice employed by the defendants was of the kind charged in the indictment. It is not necessary that it be proved that the scheme and artifice included the making of all the alleged false pretenses, representations and promises, but it is sufficient if anyone or more of them be proved to have been made, and that the same were designed to and would be reasonably effective in deceiving and defrauding persons with whom the defendants proposed to and did deal.

Any false, deceptive or deluding pretenses put forth through the mails to obtain other people's money is an offense under this law. Mere falsity of representations is not, however, sufficient. A false representation does not amount to fraud unless it is made with fraudulent intent.

The letters mailed need not be effective to carry out the scheme, need not be of themselves calculated to do so, need not be criminal or objectionable, need

not disclose a fraudulent purpose and need not show on their face that it was in furtherance of the scheme; but they must have some relation to, and be a step in the attempted execution of, the scheme, and must be mailed (or delivered) with the intent to aid its execution.

In determining the matter, it is immaterial whether you do or do not believe that the persons who parted with money were or were not gullible or whether they should or should not have parted with the money under such circumstances, if in fact there was a scheme to defraud and the mails were used for the purpose of executing the scheme by the defendant, and they are proved beyond a reasonable doubt.

The essence of the offense is the use of the mail in execution of a scheme to defraud. And the mails must actually be used. And where, as here, it is charged that the use of the mail consisted of placing or causing to be placed in the mails and knowingly causing to be delivered by the United States mails according to the directions thereon certain letters as set forth in the various counts of the indictment, such use of the mails by the defendant must be proved beyond a reasonable doubt before he can be found guilty under any of the counts of the indictment. This fact, like any other fact, may be established by direct or by circumstantial evidence, as these terms are defined in these instructions. If the fact of such use of the mails be not established

beyond a reasonable doubt, you must find the defendant not guilty even though you believe that a scheme to defraud the recipients of the letters sent out in the indictment, existed and that the defendant carried on negotiations in regard thereto.

You are further instructed that the charge that the representations made in said indictment letters are false and untrue, or representations made during the negotiations with the recipients of said indictment letters are false and untrue, must be established by the Government and all presumptions as to innocence compels you to assume the truthfulness of said representations, unless the Government has established beyond a reasonable doubt the falsity of said representations.

Before you can find the defendant guilty on any one of the counts, first you must find that the representations set out in the scheme or artifice were false and untrue, and that the defendant had actual knowledge that they were false and untrue.

The intent of a defendant charged under the provisions of the law stated is a material element necessary to prove the offense, and in arriving at a decision upon that question all the facts and circumstances shown in the case as touching the conduct of the defendant should be considered. If a man shall make to another a representation as to things which do not exist and it appears that he had no reasonable ground to believe that the fact is as he states it, such statements and conduct are to be taken into consideration in determining whether an

innocent misstatement was made in good faith, or whether the intent was that others were to be deceived and that the first person should reap a benefit and the other suffer a loss. Criminal intent may be implied from the acts and conduct of an accused. His acts and his conduct, as shown by the evidence, considered in their relation to the charge made, may establish satisfactorily a criminal intent. If the statements alleged to have been falsely and fraudulently made by a defendant were made in good faith, and the defendant believed at the time, or had reason to believe them to be true, they would not be evidence of fraud.

You are further instructed that you must disregard all representations which contain matters of opinion or promises of future performance, unless you find that said statements of opinion were made with a reckless disregard for the truth, or with the actual knowledge of the falsity thereof, or that at the time said promises were made by the defendant, they were not made in good faith, and that the defendant at said time had no intention of fulfilling said promises.

In order to find the defendant guilty, it is not necessary to determine that money was actually sent through the mails to him or to any other person at his solicitation. The use of the mails may be unpremeditated and incidental to the scheme to defraud.

Statements or expectations as to future or incidental events or as to expectations or probabilities,

or what will be or is intended to be done in the future or mere expressions of opinion about what will occur in the future or as to results as to what will be anticipated in the future, from present existing conditions, if made in good faith, do not constitute fraud, although they actually turn out to be false.

You are, therefore, instructed that you must disregard all representations which contain matters of opinion or promises of future performance, unless you find that said statements of opinion were made with a reckless disregard for the truth, or with the actual knowledge of the falsity thereof, or that at the time said promises were made by the defendant, they were not made in good faith, and that the defendant at said time had no intention of fulfilling said promises.

On the other hand, false representations and promises made with knowledge of such falsity and in furtherance of a scheme to defraud are not justified or excused by the hope or expectation, in the mind of the person making such false representations, or participating in the scheme to defraud, that such scheme would ultimately or eventually be successful and profitable.

I instruct you that you are not permitted to draw any inference unfavorable to the defendant from the mere fact that he engaged in a speculative business, or from the fact that his venture did not prove successful.

The good faith of the defendant is to be determined and his several acts and declarations are to be construed and interpreted in the light of conditions as they appeared to the defendant to be at the time the statements or promises were made. The defendant is not on trial for errors of judgment. He is on trial for a criminal offense, an essential element of which is an evil or criminal intent. This, the Government must prove to your satisfaction, beyond a reasonable doubt and to a moral certainty, and if the Government has failed to do so, then it is your duty to acquit the defendant.

The instructions which are to follow relate to the Securities and Exchange counts, that is, Counts 14, 15 and 16, although, of course, the general instructions which I have given relating to reasonable doubt and the other principle of law apply alike to all the counts in the indictment.

Counts 14, 15, and 16 of the indictment charge the defendant with violation of the provisions of the Federal Securities Act which, among other things, prohibits the use of the mails to sell or deliver after sale any security unless such security has been registered with the Securities and Exchange Commission, the branch of the Federal government having charge of such matters.

The Act requires that a registration statement describing the securities and the issuer be filed with the Securities and Exchange Commission and the further requirement that a prospectus summarizing the important information of the regis-

tration statement be furnished to all persons to whom securities are offered.

The registration statement must be signed by the issuer and its controlling officers. They and any experts who assist in the preparation of the statement must take responsibility for the accuracy of the registration statement.

To secure compliance with the requirements regarding registration of securities the Federal Securities Act of 1933, among other things, prohibits the use of the mails to sell or deliver any security after sale unless a registration statement is in effect as to such security.

The Section of the Act which the defendant Shaw is charged with violating is Section 5(a)(2), which reads as follows:

> "Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> "(2) To carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

In determining whether or not there has been a willful violation of this Section, as alleged in Counts 14, 15 and 16, you must determine whether or not there was a registration statement in effect as to the shares of stock of Consolidated Mines of California, whether or not such securities were actu-

ally sold to the witnesses Goodrich, Arnold and Woodruff, or any of them, and you must further determine whether or not the defendant Shaw caused any of such securities of the Consolidated Mines of California to be carried through the mails for sale or for delivery after sale.

The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant. The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned.

In determining whether or not the mails were willfully used, you must consider whether or not such mailing was unintentional or whether it was deliberate. Willfully means intentionally as opposed to negligently or inadvertently.

In determining whether or not the defendant Shaw caused the securities in question to be carried through the mails for sale or delivery after sale, it is not necessary for you to find that he personally mailed them or personally directed that they be mailed. If the mails were used in the ordinary course of business so far as the stock selling activities were concerned, and if the defendant Shaw was engaged with Frank S. Tyler and others and they were associated together and acting in concert in carrying on the stock sales activity, then any mailings of securities in the regular course of such sales activities are binding on defendant Shaw.

Counts 14, 15 and 16 are separate and distinct from the first 13 counts of the indictment. Counts 14, 15 and 16, do not involve any of the charges contained in the first 13 counts. They each charge a wholly different crime and a violation of a wholly different statute, and are based on alleged violations of the registration provisions of the Securities Act of 1933. So far as these three counts are concerned, it is wholly immaterial whether or not any fraud whatsoever was actually committed in the sale of these securities.

The indictment in Counts 14, 15 and 16 charges that the defendant "wilfully and unlawfully" did the acts and things alleged in the indictment. In this connection you are instructed that there is a very real and vital difference between simply doing an act and doing an act wilfully. In the first case no bad intent or purpose is involved, while in the second case of "wilfully" doing the act, the elements of guilty knowledge and bad purpose are involved and constitute the gist of the offense. The use of the word "wilfully" in that connection in an indictment implies not merely "voluntarily" but also an evil intent and bad purpose to do wrong.

So that in this case, even though you should be convinced beyond a reasonable doubt that the defendant did the acts and things alleged in these counts of the indictment voluntarily, nevertheless your verdict must be for the defendant unless you are convinced beyond a reasonable doubt that the defendant did the acts and things alleged in the in-

dictment with evil intent and bad purpose to do wrong.

In a prosecution for selling securities in violation of the Securities Act of 1933, if the defendant charged with making a sale of the securities acted in good faith in honest belief that he had a right to make such sale, then he is not guilty of any criminal offense.

Ordinarily, advice of counsel is not a defense to the commission of an offense. However, where an offense requires a specific criminal intent, the fact that a defendant acted in good faith on advice of counsel, after full disclosure of all facts, may negative the existence of the criminal intent without which the offense is not proved, or may raise a reasonable doubt in the jury's mind as to the guilt of the defendant.

Your first duty on retiring to the jury room to begin deliberations in this case will be to select one of your number as foreman. In federal courts, in both civil and criminal cases, unanimity is required for a verdict. In other words, all must agree before a verdict can be returned.

For your benefit and to assist you, the Clerk has prepared a blank form of verdict which reads: Title of the court and cause: "We, the jury in the above-entitled cause, find the defendant William Jackson Shaw ..... as charged in the indictment."

Then there is a similar line for each one of the 16 counts in the indictment.

Now if you find the defendant guilty as to Count 1 of the indictment, you will have your foreman write the word "guilty" in the blank space in front of that count. If you find him not guilty, you will write the words "not guilty". That applies to every count in the indictment.

By what I say, however, it does not mean to intimate that you have to make any particular finding consistent as to all the counts. You may find one verdict as to one count and another verdict as to another count.

That applies not only as to Counts 14, 15, and 16, which relate to a different offense than the first 13, but that applies also as to all the counts relating to the same offense.

In other words, there is absolute freedom of action as to the conclusions you reach as to every one of these counts. You are free to determine, according to the evidence and your conscience, as to whether as to a particular count a verdict should be one way or another, and then you must use the same kind of independent judgment as to all others.

When a verdict has been arrived it must be dated at the place indicated and signed by your foreman and returned to this court.

Now before I swear the bailiffs to take charge of the jury, it becomes necessary to dispose of the two alternate jurors, and before I excuse them I desire to address myself to the first 12.

This case has taken several weeks to try. Of course, we haven't worked full time all the time,

and the first week we really worked only one day. I think there have been 12 trial days so far.

Deliberations may take time. It is the kind of case where the jury should have ample opportunity to discuss and deliberate in the matter, and before I excuse the two alternates, I want to know if there are any members of the 12 who, because of illness, feels that he may not be up to the strain that any deliberation may require. If so, this is the time to speak. And also if there is anyone—there is a possibility, of course, gentlemen, that the moment you go out of here you don't go home until you get a verdict, and there is a possibility that you may be locked up—not in the sense of being locked in jail, but I mean you will not be allowed to separate, they will take you to a nice hotel if you stay out overnight—so the question of any consideration in your family, any situation such as illness in the family, if there be that, I want to know because, as I say, the moment you go out you have to remain together until you have arrived at a verdict.

Juror Daniels: Judge, your Honor please, I just want, if you will permit me to say a word in regard to—not only sickness, but——

The Court: No. The only question you can speak on is merely in regard to this situation.

Juror Daniels: I just want to speak directly to your Honor on appreciation of my service here.

The Court: That is all right. Do that some other time.

Juror Daniels: I didn't know whether I would get back or not, and I wanted to——

The Court (Interrupting): That is all right. I will be here when you bring in the verdict. You can do that later.

All right.

I gather then that every one of the 12 jurors, regular jurors, feel that they can begin deliberation and have no ground for being excused.

(No response.)

Then before I excuse the alternate jurors, I am going to ask the usual question whether there are any exceptions either by the Government or the defendant to the charges as given by the Court.

Mr. Montgomery: No, your Honor.

Mr. Norcop: The instructions are entirely satisfactory to the Government.

The Court: All right.

Mr. Norcop: May I make one inquiry?

The Court: Yes.

Mr. Norcop: As to whether or not it is the policy —this is the first long case, as your Honor has said before, that I have tried in this Court—to allow the jury to examine any of the exhibits if they so desire.

The Court: I will instruct the jury that they may have the indictment and the instructions by asking for them. If there is any exhibit that they need during deliberations, it will be sent out to you if you make your desire known to the bailiff or send me a

note identifying the exhibit so that I will know what you want.

Mr. Montgomery: I make objection to the personally owned stock instruction with respect to the Federal Securities and Exchange Act, where you said that they did not recognize the difference between personally owned stock and others. I have forgotten just how the language read. I want to register a formal exception.

The Court: All right. It correctly states my interpretation of the law.

Gentlemen, I may say that in federal court procedure it is provided that at the conclusion of the charge each side may object to any portion of the instructions.

The basis for that is that a court may make a mistake as to the law and counsel are privileged to call the error to the court's attention. It is also the only way they have of later on in further proceedings questioning the instructions.

In civil cases it is now provided it should be done outside of the presence of the jury, but in criminal cases the old provision still remains. It is within the legal rights of either side to do so, and you are not to draw any inference whatsoever from the fact that an exception is noted to an instruction.

It is for the Court to say whether the exception is good or not, and my answer to the particular exception is that the instructions stand as I have read them to you.

Now, Mr. Schumacher and Mr. Meredith, you will be excused until you are notified. I desire to thank you for your service in the matter.

May I enjoin upon you absolute*le* secrecy in regard to the matter, not to discuss the matter until after you have learned of a verdict, then of course you are free to, but until that time your oath of secrecy still applies and you are not to make any comment to anyone as to what your conclusions might be as to any of the facts relating to the case.

Now, if you will withdraw.

(Whereupon the alternate jurors retired from the courtroom.)

The Court: And now swear the bailiffs to take charge of the jury.

(Whereupon, two bailiffs were duly sworn to take charge of the jury.)

The Court: Gentlemen, you will now retire and begin your debilerations of this case.

(Whereupon, at 3:25 o'clock p.m., the jury retired for deliberations.)

The Court: All right, gentlemen. We will stand at recess until we have word from the jury.

(Whereupon, at 3:30 o'clock p.m., a recess was taken subject to the call of the court.)

EXCEPTIONS

1. The defendant excepted to the ruling of the Court sustaining the Government's demurrer to the defendant Shaw's Plea in Abatement.

2. The defendant excepted to the ruling of the Court granting the Government's motion to strike the defendant Shaw's Plea in Abatement.

3. The defendant excepted to the ruling of the Court overruling the defendant Shaw's demurrer to Counts 1 to 16 inclusive of the indictment.

4. The defendant excepted to the ruling of the Court denying the defendant Shaw's demand for a Bill of Particulars.

5. The defendant excepted to one instruction contained in the Court's instructions and that instruction pertained to Counts 14, 15, and 16, and as given by the Court reads as follows:

> "The Section of the Act which the defendant Shaw is charged with violating is Section 5(a)(2), which reads as follows:
>
> " 'Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or *indirectly*——
>
> " '(2) To carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.' "

In determining whether or not there has been a willful violation of this Section, as alleged in Counts 14, 15, and 16, you must determine whether or not there was a registration statement in effect as to the shares of stock of Consolidated Mines of California, whether or not such securities were ac-

tually sold to the witnesses Goodrich, Arnold and Woodruff, or any of them, and you must further determine whether or not the defendant Shaw caused any of such securities of the Consolidated Mines of California to be carried through the mails for sale or for delivery after sale.

The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant. The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned.

6. The defendant duly excepted to the ruling of the Court denying his written motion for a new trial, which motion reads as follows:

[Set forth at Page 108 of this printed Transcript of Record.]

(The sufficiency of the evidence was questioned for the first time on the motion for a new trial, except at the conclusion of the Government's testimony, and a motion to dismiss Counts 14, 15, and 16 was made, but no exception was noted to the Court's ruling, nor was the motion renewed in the form of a request for a directed verdict at the conclusion of the case, or at any time during the proceedings.)

Respectfully submitted,
MORRIS LAVINE
Attorney for Defendant and
Appellant

In the District Court of the United States in and for the Southern District of California, Central Division.

No. 14200-Y

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM JACKSON SHAW,

Defendant.

ORDER APPROVING BILL OF EXCEPTIONS

An order approving the Bill of Exceptions having been duly presented to this Court and having been amended to correspond with the facts, is now settled, signed, and made a part of the records within the term and within the time fixed by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: February 10th, 1942.

LEON R. YANKWICH
United States District Judge.

[Endorsed]: Lodged Jan. 27, 1942.

[Endorsed]: Filed Feb. 10, 1942.

Received copy of the within Bill of Exceptions this January 27, 1942.

WILLIAM FLEET PALMER
United States Attorney
By MAURICE NORCOP
Assistant United States Attorney.

At a Stated Term, to wit: The October Term 1941, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the sixteenth day of January in the year of our Lord one thousand nine hundred and forty-two.

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding, Honorable Francis A. Garrecht, Circuit Judge, Honorable Albert Lee Stephens, Circuit Judge.

No. 9916

WILLIAM JACKSON SHAW,

Appellant,

vs.

UITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS, AND TO FILE ASSIGNMENTS OF ERROR.

Upon consideration of the application of Mr. Morris Lavine, counsel for appellant, and his affidavit in support thereof, and telegraphic advice of consent of the United States Attorney for an extension of time within which to settle and file the bill of exceptions in this cause, and good cause therefor appearing,

It Is Ordered that the time within which appellant may have settled and filed his bill of exceptions on his appeal herein, and file his assignments of error, be, and hereby is extended to and including January 30, 1942.

At a Stated Term, to wit: The October Term 1941, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the twenty-eighth day of January in the year of our Lord one thousand nine hundred and forty-two.

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding, Honorable Francis A. Garrecht, Circuit Judge, Honorable William Denman, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO SETTLE AND FILE BILL OF EXCEPTIONS.

Upon consideration of the motion of Mr. Morris Lavine, counsel for appellant, and his supporting affidavit, and stipulation of counsel for respective parties, and good cause therefor appearing,

It Is Ordered that the time within which appellant may have settled and filed his bill of exceptions on his appeal herein be, and hereby is extended to and including February 16, 1942.

[Endorsed]: No. 9916. United States Circuit Court of Appeals for the Ninth Circuit. William Jackson Shaw, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 13, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9916

WILLIAM JACKSON SHAW,
Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA,
Plaintiff and Appellee.

STATEMENT OF POINTS TO BE RELIED ON, AND DESIGNATION OF THE RECORD.

Comes now the above-named appellant William Jackson Shaw and hereby requests the Clerk of the above-entitled Court to have included in the transcript of the record the following papers:

1. The Indictment;

2. Plea in Abatement and Motion to Strike;
3. Demurrer to Plea in Abatement;
4. Demurrer to the Indictment;
5. Minutes of the Court on the Demurrer to Plea in Abatement and Motion to Strike Plea in Abatement and Demurrer;
6. Motion for a New Trial and Minutes of the Court in regard to same;
7. Judgment and Sentence;
8. Notice of Appeal;
9. Bill of Exceptions as approved and allowed by the Court;
10. Order approving and settling the Bill of Exceptions;
11. Assignment of Errors;
12. This Statement of Points to be Relied on, and Designation of the Record and Stipulation.

The above-named appellant further states that it is his intention to rely on each and every point set forth in all the assignments of errors.

Dated: April 8th, 1942.

MORRIS LAVINE,
Attorney for Appellant.

Received copy of the within this 8th day of April, 1942.

WILLIAM FLEET PALMER,
United States Attorney,
By MAURICE NORCOP.

[Endorsed]: Filed Apr. 9, 1942.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF MATTERS UPON WHICH APPELLANT INTENDS TO RELY AND STIPULATION AS TO RECORD.

Comes now the above-named appellant William Jackson Shaw, and states that he will rely upon the evidence in the case as set forth in the Bill of Exceptions, and all motions and points of law as set forth in the same, and on the assignment of errors, and hereby adopts as his respective points to be relied upon in this appeal all those set forth in the assignment of errors heretofore prepared and filed by him.

Dated: April 8th, 1942.

MORRIS LAVINE,
Attorney for Appellant.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the Government of the United States, through United States Attorney William Fleet Palmer, by Maurice Norcop, Assistant United States Attorney, and William Jackson Shaw, through his attorney, Morris Lavine, that foregoing record will be the complete record necessary for the consideration of the appeal for both sides.

Dated: April 8th, 1942.

WILLIAM FLEET PALMER,
United States Attorney,
By MAURICE NORCOP,
Assistant United States
Attorney,
Attorney for Appellee,
MORRIS LAVINE,
Attorney for Appellant.

Received copy of the within this 8th day of April, 1942.

WILLIAM FLEET PALMER,
United States Attorney,
By MAURICE NORCOP.

[Endorsed]: Filed Apr. 9, 1942.

No. 9916

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

MORRIS LAVINE,
619 Bartlett Building, Los Angeles,
Attorney for Appellant.

Parker & Baird Company, Law Printers, Los Angeles

Title I

SECURITIES ACT OF 1933 as amended[1]

Title II

CORPORATION OF FOREIGN BONDHOLDERS ACT, 1933

[PUBLIC—No. 22—73D CONGRESS]

[H.R. 5480]

AN ACT

To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I

SHORT TITLE

SECTION 1. This title may be cited as the "Securities Act of 1933".

DEFINITIONS

SEC. 2. When used in this title, unless the context otherwise requires—

(1) The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for,

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[1] The matter appearing in **bold-face** type with footnote references represents subsections and subparagraphs *as amended*. The footnotes contain the text prior to amendment. **Bold-faced** type without footnote references indicates *provisions added* by amendment. The amendments, except, as otherwise noted, became effective July 1, 1934, and are contained in Title II of Securities Exchange Act of 1934, Public, No. 291, 73d Congress, approved June 6, 1934.

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guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.[2]

(2) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust, any unincorporated organization, or a government or political subdivision thereof. As used in this paragraph the term "trust" shall include only a trust where the interest or interests of the beneficiary or beneficiaries are evidenced by a security.

(3) The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; except that such terms shall not include preliminary negotiations or agreements between an issuer and any underwriter. Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The issue or transfer of a right or privilege, when originally issued or transferred with a security, giving the holder of such security the right to convert such security into another security of the same issuer or of another person, or giving a right to subscribe to another security of the same issuer or of another person, which right cannot be exercised until some future date, shall not be deemed to be a sale of such other security; but the issue or transfer of such other security upon the exercise of such right of conversion or subscription shall be deemed a sale of such other security.

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or other mineral rights, the term "issuer" means the owner of any such right or of any interest in such

[2] "(1) The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, reorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of interest in property, tangible or intangible, or, in general, any instrument commonly known as a security, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing."

right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.[3]

(5) The term "Commission" means the Federal Trade Commission.[4]

(6) The term "Territory" means Alaska, Hawaii, Puerto Rico, the Philippine Islands, Canal Zone, the Virgin Islands, and the insular possessions of the United States.

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

(9) The term "write" or "written" shall include printed, lithographed, or any means of graphic communication.

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of Section 10 was sent or given to the person to whom the communication was made, by the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of Section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed.[5]

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or par-

[3] "(4) The term 'issuer' means every person who issues or proposes to issue any security or who guarantees a security either as to principal or income; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term 'issuer' means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and, except that with respect to equipment-trust certificates or like securities, the term 'issuer' means the person by whom the equipment or property is or is to be used."

[4] See Secs. 27 and 28, infra, being Sections 210 and 211, Title II of Securities Exchange Act of 1934, providing for transfer to "Securities and Exchange Commission" of all powers, duties, and functions of the Federal Trade Commission.

[5] "(10) The term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio, which offers any security for sale; except that (a) a communication shall not be deemed a prospectus if it is proved that prior to such communication a written prospectus meeting the requirements of section 10 was received, by the person to whom the communication was made, from the person making such communication or his principal, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 may be obtained and, in addition, does no more than identify the security, state the price thereof, and state by whom orders will be executed."

ticipates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

(12) The term "dealer" means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person.

EXEMPTED SECURITIES

SEC. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days;

(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories, or by any person controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or any certificate of deposit for any of the foregoing, or any security issued or guaranteed by any national bank, or by any banking institution organized under the laws of any State or Territory or the District of Columbia, the business of which is substantially confined to banking and is supervised by the State or Territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal Reserve Bank; [6]

[NOTE: See Appendix, I–F, p. 37, re additional exemption for securities issued under mortgage indenture insured under National Housing Act.]

(3) Any note, draft, bill of exchange, or bankers' acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months,

[6] "(2) Any security issued or guaranteed by the United States or any Territory thereof, or by the District of Columbia, or by any State of the United States, or by any political subdivision of a State or Territory, or by any public instrumentality of one or more States or Territories exercising an essential governmental function, or by any corporation created and controlled or supervised by and acting as an instrumentality of the Government of the United States pursuant to authority granted by the Congress of the United States, or by any national bank, or by any banking institution organized under the laws of any State or Territory, the business of which is substantially confined to banking and is supervised by the State or territorial banking commission or similar official; or any security issued by or representing an interest in or a direct obligation of a Federal reserve bank;"

exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited;

(4) Any security issued by a person [7] organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder, or individual;

(5) Any security issued by a building and loan association, homestead association, savings and loan association, or similar institution, substantially all the business of which is confined to the making of loans to members (but the foregoing exemption shall not apply with respect to any such security where the issuer takes from the total amount paid or deposited by the purchaser, by way of any fee, cash value or other device whatsoever, either upon termination of the investment at maturity or before maturity, an aggregate amount in excess of 3 per centum of the face value of such security), or any security issued by a farmers' cooperative association as defined in paragraphs (12), (13), and (14) of section 103 of the Revenue Act of 1932;

(6) Any security issued by a common **or contract** carrier, **the issuance** of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended; [8]

> [NOTE: See Appendix, I–E, p. 35, for relevant provisions of Interstate Commerce Commisison and Motor Carrier Acts.]

(7) Certificates issued by a receiver or by a trustee in bankruptcy, with the approval of the court;

(8) Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia;

> [NOTE: See Appendix, I–G, p. 37, for limitation on this section with respect to investment companies.]

(9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange;

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval; [9]

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[7] "Corporation."

[8] The words in **bold-face** are an amendment to Section 3 (a) (6) of the Securities Act of 1933, as provided in Section 214 of the "Motor Carrier Act of 1935", approved August 9, 1935.

[9] The first clause of the following former Sec. 4 (3) has been replaced by Sec. 3 (a) (9) and the second clause by Sec. 3 (a) (10): "(3) The issuance of a security of a person ex-

[NOTE: See Appendix, I–A, B, C, and D, pp. 31–34, for additional exemptions provided by the Bankruptcy Act.]

(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.[10]

[NOTE: See Appendix, I–G, p. 37, for limitation of this section with respect to investment companies.]

(b) The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

EXEMPTED TRANSACTIONS

SEC. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.[11]

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changed by it with its existing security holders exclusively, where no commission or other remuneration is paid or given directly or indirectly in connection with such exchange; or the issuance of securities to the existing security holders or other existing creditors of a corporation in the process of a bona fide reorganization of such corporation under the supervision of any court, either in exchange for the securities of such security holders or claims of such creditors or partly for cash and partly in exchange for the securities or claims of such security holders or creditors.'

[10] The following former Sec. 5 (c) has been supplanted by Sec. 3 (a) (11): "(c) The provisions of this section relating to the use of the mails shall not apply to the sale of any security where the issue of which it is a part is sold only to persons resident within a single State or Territory, where the issuer of such securities is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory."

[11] "(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not with or through an underwriter and not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the last date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

(2) Brokers' transactions, executed upon customers' orders on any exchange or in the open or counter market, but not the solicitation of such orders.

PROHIBITIONS RELATING TO INTERSTATE COMMERCE AND THE MAILS

SEC. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of section 10.

REGISTRATION OF SECURITIES AND SIGNING OF REGISTRATION STATEMENT

SEC. 6. (a) Any security may be registered with the Commission under the terms and conditions hereinafter provided, by filing a registration statement in triplicate, at least one of which shall be signed by each issuer, its principal executive officer or officers, its principal financial officer, its comptroller or principal accounting officer, and the majority of its board of directors or persons performing similar functions (or, if there is no board of directors or persons performing similar functions, by the majority of the persons or board having the power of management of the issuer), and in case the issuer is a foreign or Territorial person by its duly authorized representative in the United States; except that when such registration statement relates to a security issued by a foreign government, or political subdivision thereof, it need be signed only by the underwriter of such security. Signatures of all such persons when written on the said registration statements shall be presumed to have been so written by authority of the person whose signature is so affixed and the burden of proof, in the event such authority shall be denied, shall be upon the party denying the same. The affixing of any signature without the authority of the purported signer shall constitute a violation of this title. A registration statement shall be deemed effective only as to the securities specified therein as proposed to be offered.

(b) At the time of filing a registration statement the applicant shall pay to the Commission a fee of one one-hundredth of 1 per

centum of the maximum aggregate price at which such securities are proposed to be offered, but in no case shall fee be less than $25.

(c) The filing with the Commission of a registration statement, or of an amendment to a registration statement, shall be deemed to have taken place upon the receipt thereof, but the filing of a registration statement shall not be deemed to have taken place unless it is accompanied by a United States postal money order or a certified bank check or cash for the amount of the fee required under subsection (b).

(d) The information contained in or filed with any registration statement shall be made available to the public under such regulations as the Commission may prescribe, and copies thereof, photostatic or otherwise, shall be furnished to every applicant at such reasonable charge as the Commission may prescribe.

(e) No registration statement may be filed within the first forty days following the enactment of this Act.

INFORMATION REQUIRED IN REGISTRATION STATEMENT

SEC. 7. The registration statement, when relating to a security other than a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule A,[12] and when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B; except that the Commission may by rules or regulations provide that any such information or document need not be included in respect of any class of issuers or securities if it finds that the requirement of such information or document is inapplicable to such class and that disclosure fully adequate for the protection of investors is otherwise required to be included within the registration statement. If any accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, is named as having prepared or certified any part of the registration statement, or is named as having prepared or certified a report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement. If any such person is named as having prepared or certified a report or valuation (other than a public official document or statement) which is used in connection with the registration statement, but is not named as having prepared or certified such report or valuation for use in connection with the registration statement, the written consent of such person shall be filed with the registration statement unless the Commission dispenses with such filing as impracticable or as involving undue hardship on the person filing the registration statement. Any such registration statement shall contain such other information, and be accompanied by such other documents, as the Commission may by rules or regulations

[12] Section 24 (a) of the Investment Company Act of 1940 provides that an investment company registered under that Act may submit copies of the documents which it is required to file under that title in lieu of the registration statement specified in Schedule A of the Securities Act of 1933. [The text of this section is set forth in full in the Appendix, II–C, p. 40.]

require as being necessary or appropriate in the public interest or for the protection of investors.

[NOTE: See Appendix, II–A, p. 38, for requirements relating to securities issued under an indenture; see Appendix, II–B, 1–4, pp. 38–39, for situations in which alternate materials may be filed or incorporation by reference is permitted; see Appendix, II–B, 5, p. 39, for extent of obligation to file supplementary information.]

TAKING EFFECT OF REGISTRATION STATEMENTS AND AMENDMENTS THERETO

Sec. 8. (a) Except as hereinafter provided, the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine, having due regard to the adequacy of the information respecting the issuer theretofore available to the public, to the facility with which the nature of the securities to be registered, their relationship to the capital structure of the issuer and the rights of holders thereof can be understood, and to the public interest and the protection of investors. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed; except that an amendment filed with the consent of the Commission, prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement.[13]

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(c) An amendment filed after the effective date of the registration statement, if such amendment, upon its face, appears to the Commission not to be incomplete or inaccurate in any material respect,

[13] This is an amendment approved August 22, 1940, as Title III of Public, No. 768, 76th Cong., An Act "To provide for the registration and regulation of investment companies and investment advisers ——." It supplants the former Sec. 8 (a) which read:

"The effective date of a registration statement shall be the twentieth day after the filing thereof, except as hereinafter provided, and except that in case of securities of any foreign public authority, which has continued the full service of its obligations in the United States, the proceeds of which are to be devoted to the refunding of obligations payable in the United States, the registration statement shall become effective seven days after the filing thereof. If any amendment to any such statement is filed prior to the effective date of such statement, the registration statement shall be deemed to have been filed when such amendment was filed except that an amendment filed with the consent of the Commission prior to the effective date of the registration statement, or filed pursuant to an order of the Commission, shall be treated as a part of the registration statement."

shall become effective on such date as the Commission may determine, having due regard to the public interest and the protection of investors.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

[NOTE: See Appendix, II–D, p. 40, for additional basis of stop order re investment companies; as to consolidation of proceedings with those under Trust Indenture Act see Appendix, II–E, p. 41.]

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

(f) Any notice required under this section shall be sent to or served on the issuer, or, in case of a foreign government or political subdivision thereof, to or on the underwriter, or, in the case of a foreign or Territorial person, to or on its duly authorized representative in the United States named in the registration statement, properly directed in each case of telegraphic notice to the address given in such statement.

COURT REVIEW OF ORDERS

SEC. 9. (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained

of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. The finding of the Commission as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

INFORMATION REQUIRED IN PROSPECTUS

SEC. 10. (a) A prospectus—

(1) when relating to a security other than a security issued by a foreign government or political subdivision thereof, shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (28) to (32), inclusive, of Schedule A;

(2) when relating to a security issued by a foreign government or political subdivision thereof shall contain the same statements made in the registration statement, but it need not include the documents referred to in paragraphs (13) and (14) of Schedule B.

(b) Notwithstanding the provisions of subsection (a)—

(1) When a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use, so far as such information is known to the user of such prospectus or can be furnished by such user without unreasonable effort or expense.[14]

(2) there may be omitted from any prospectus any of the statements required under such subsection (a) which the Commission may by rules or regulations designate as not being neces-

[14] "(1) when a prospectus is used more than thirteen months after the effective date of the registration statement, the information in the statements contained therein shall be as of a date not more than twelve months prior to such use."

sary or appropriate in the public interest or for the protection of investors.

(3) any prospectus shall contain such other information as the Commission may by rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors.

(4) in the exercise of its powers under paragraphs (2) and (3) of this subsection, the Commission shall have authority to classify prospectuses according to the nature and circumstances of their use, and, by rules and regulations and subject to such terms and conditions as it shall specify therein, to prescribe as to each class the form and contents which it may find appropriate to such use and consistent with the public interest and the protection of investors.

(c) The statements or information required to be included in a prospectus by or under authority of subsection (a) or (b), when written, shall be placed in a conspicuous part of the prospectus in type as large as that used generally in the body of the prospectus.

(d) In any case where a prospectus consists of a radio broadcast, copies thereof shall be filed with the Commission under such rules and regulations as it shall prescribe. The Commission may by rules and regulations require the filing with it of forms and prospectuses used in connection with the sale of securities registered under this title.

[NOTE: For additional powers of the Commission as to prospectuses of certain investment trust securities see Appendix, II–D, p. 40.]

CIVIL LIABILITIES ON ACCOUNT OF FALSE REGISTRATION STATEMENT

SEC. 11. (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or cease or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1), and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a

report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.[15]

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.[16]

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less

[15] "(C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement of the expert or was a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true, and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, and that such part of the registration statement fairly represented the statement made by the official person or was a fair copy of or extract from the public official document."

[16] "(c) In determining for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a person occupying a fiduciary relationship."

than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, that if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this title the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.[17]

(f) All or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

CIVIL LIABILITIES ARISING IN CONNECTION WITH PROSPECTUSES AND COMMUNICATIONS

SEC. 12. Any person who—

(1) sells a security in violation of section 5, or

(2) sells a security (whether or not exempted by the provisions of section 3, other than paragraph (2) of subsection (a) thereof), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in the light of the circumstances under which they were made, not mislead-

[17] "(e) The suit authorized under subsection (a) may be either (1) to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or (2) for damages if the person suing no longer owns the security."

ing (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission

shall be liable to the person purchasing such security from him, who, may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

LIMITATION OF ACTIONS

Sec. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than three years after the security was bona fide offered to the public, or under section 12 (2) more than three years after the sale.[18]

CONTRARY STIPULATIONS VOID

SEC. 14. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this title or of the rules and regulations of the Commission shall be void.

LIABILITY OF CONTROLLING PERSONS

SEC. 15. Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under section 11 or 12, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

ADDITIONAL REMEDIES

SEC. 16. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

[18] "SEC. 13. No action shall be maintained to enforce any liability created under section 11 or section 12 (2) unless brought within two years after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12 (1), unless brought within two years after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or section 12 (1) more than ten years after the security was bona fide offered to the public."

FRAUDULENT INTERSTATE TRANSACTIONS

SEC. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

STATE CONTROL OF SECURITIES

SEC. 18. Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person.

SPECIAL POWERS OF COMMISSION

SEC. 19. (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, and defining accounting, technical, and trade terms used in this title. Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets

or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of the Interstate Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. **No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.**

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission or any officer or officers designated by it are empowered to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

INJUNCTIONS AND PROSECUTION OF OFFENSES

SEC. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the Supreme Court of the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

(c) Upon application of the Commission the district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia, shall also have juris-

diction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof.

HEARINGS BY COMMISSION

SEC. 21. All hearings shall be public and may be held before the Commission or an officer or officers of the Commission designated by it, and appropriate records thereof shall be kept.

JURISDICTION OF OFFENSES AND SUITS

SEC. 22. (a) The district courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 128 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 225 and 347). No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

(b) In case of contumacy or refusal to obey a subpena issued to any person, any of the said United States courts, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

UNLAWFUL REPRESENTATIONS

SEC. 23. Neither the fact that the registration statement for a security has been filed or is in effect nor the fact that a stop order is not in effect with respect thereto shall be deemed a finding by the Commission that the registration statement is true and accurate on its face or that it does not contain an untrue statement of fact or omit to state a material fact, or be held to mean that the Commission has in any way passed upon the merits of, or given approval to, such security. It shall be unlawful to make, or cause to be made, to any prospective purchaser any representation contrary to the foregoing provisions of this section.

PENALTIES

SEC. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

JURISDICTION OF OTHER GOVERNMENT AGENCIES OVER SECURITIES

SEC. 25. Nothing in this title shall relieve any person from submitting to the respective supervisory units of the Government of the United States information, reports, or other documents that are now or may hereafter be required by any provision of law.

SEPARABILITY OF PROVISIONS

SEC. 26. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Sec. 27. Upon the expiration of sixty days after the date upon which a majority of the members of the Securities and Exchange Commission appointed under Section 4 of Title I of this act have qualified and taken office, all powers, duties and functions of the Federal Trade Commission under the Securities Act of 1933 shall be transferred to such Commission, together with all property, books, records and unexpended balances of appropriations used by or available to the Federal Trade Commission for carrying out its functions under the Securities Act of 1933. All proceedings, hearings or investigations commenced or pending before the Federal Trade Commission arising under the Securities Act of 1933 shall be continued by the Securities and Exchange Commission. All orders, rules and regulations which have been issued by the Federal Trade Commission under the Securities Act of 1933 and which are in effect shall continue in effect until modified, superseded, revoked, or repealed. All rights and interests accruing or to accrue under the Securities Act of 1933, or any provision of any regulation relating to, or out of action taken by, the Federal Trade Commission

under such Act, shall be followed in all respects and may be exercised and enforced.

Sec. 28. The Commission is authorized and directed to make a study and investigation of the work, activities, personnel and functions of protective and reorganization committees in connection with the reorganization, readjustments, rehabilitation, liquidation, or consolidation of persons and properties and to report the result of its studies and investigations and its recommendations to the Congress on or before January 3, 1936.[19]

SCHEDULE A

[NOTE: See Appendix, II–B 2, p. 38, for requirements with respect to investment companies.]

(1) The name under which the issuer is doing or intends to do business;

(2) the name of the State or other sovereign power under which the issuer is organized;

(3) the location of the issuer's principal business office, and if the issuer is a foreign or territorial person, the name and address of its agent in the United States authorized to receive notice;

(4) the names and addresses of the directors or persons performing similar functions, and the chief executive, financial and accounting officers, chosen or to be chosen if the issuer be a corporation, association, trust, or other entity; of all partners, if the issuer be a partnership; and of the issuer, if the issuer be an individual; and of the promoters in the case of a business to be formed, or formed within two years prior to the filing of the registration statement;

(5) the names and addresses of the underwriters;

(6) the names and addresses of all persons, if any, owning of record or beneficially, if known, more than 10 per centum of any class of stock of the issuer, or more than 10 per centum in the aggregate of the outstanding stock of the issuer as of a date within twenty days prior to the filing of the registration statement;

(7) the amount of securities of the issuer held by any person specified in paragraphs (4), (5), and (6) of this schedule, as of a date within twenty days prior to the filing of the registration statement, and, if possible, as of one year prior thereto, and the amount of the securities, for which the registration statement is filed, to which such persons have indicated their intention to subscribe;

(8) the general character of the business actually transacted or to be transacted by the issuer;

(9) a statement of the capitalization of the issuer, including the authorized and outstanding amounts of its capital stock and the proportion thereof paid up, the number and classes of shares in which such capital stock is divided, par value thereof, or if it has no par value, the stated or assigned value thereof, a description of the respective voting rights, preferences, conversion and exchange rights, rights to dividends, profits, or capital of each class, with respect to each other class, including the retirement and liquidation rights or values thereof;

[19] Secs. 27 and 28 are Secs. 210 and 211, Title II, of Securities Exchange Act of 1934, approved June 6, 1934, effective July 1, 1934.

(10) a statement of the securities, if any, covered by options outstanding or to be created in connection with the security to be offered, together with the names and addresses of all persons, if any, to be allotted more than 10 per centum in the aggregate of such options;

(11) the amount of capital stock of each class issued or included in the shares of stock to be offered;

(12) the amount of the funded debt outstanding and to be created by the security to be offered, with a brief description of the date, maturity, and character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a summarized statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(13) the specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(14) the remuneration, paid or estimated to be paid, by the issuer or its predecessor, directly or indirectly, during the past year and ensuing year to (a) the directors or persons performing similar functions, and (b) its officers and other persons, naming them wherever such remuneration exceeded $25,000 during any such year;

(15) the estimated net proceeds to be derived from the security to be offered;

(16) the price at which it is proposed that the security shall be offered to the public or the method by which such price is computed and any variation therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than the underwriters, naming them or specifying the class. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which any underwriter is interested, made, in connection with the sale of such security. A commission paid or to be paid in connection with the sale of such security by a person in which the issuer has an interest or which is controlled or directed by, or under common control with, the issuer shall be deemed to have been paid by the issuer. Where any such commission is paid the amount of such commission paid to each underwriter shall be stated;

(18) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than commissions specified in paragraph (17) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, authentication, and other charges;

(19) the net proceeds derived from any security sold by the issuer during the two years preceding the filing of the registration state-

ment, the price at which such security was offered to the public, and the names of the principal underwriters of such security;

(20) any amount paid within two years preceding the filing of the registration statement or intended to be paid to any promoter and the consideration for any such payment;

(21) the names and addresses of the vendors and the purchase price of any property, or goodwill, acquired or to be acquired, not in the ordinary course of business, which is to be defrayed in whole or in part from the proceeds of the security to be offered, the amount of any commission payable to any person in connection with such acquisition, and the name or names of such person or persons, together with any expense incurred or to be incurred in connection with such acquisition, including the cost of borrowing money to finance such acquisition;

(22) full particulars of the nature and extent of the interest, if any, of every director, principal executive officer, and of every stockholder holding more than 10 per centum of any class of stock or more than 10 per centum in the aggregate of the stock of the issuer, in any property acquired, not in the ordinary course of business of the issuer, within two years preceding the filing of the registration statement or proposed to be acquired at such date;

(23) the names and addresses of counsel who have passed on the legality of the issue;

(24) dates of and parties to, and the general effect concisely stated of every material contract made, not in the ordinary course of business, which contract is to be executed in whole or in part at or after the filing of the registration statement or which contract has been made not more than two years before such filing. Any management contract or contract providing for special bonuses or profit-sharing arrangements, and every material patent or contract for a material patent right, and every contract by or with a public utility company or an affiliate thereof, providing for the giving or receiving of technical or financial advice or service (if such contract may involve a charge to any party thereto at a rate in excess of $2,500 per year in cash or securities or anything else of value), shall be deemed a material contract;

(25) a balance sheet as of a date not more than ninety days prior to the date of the filing of the registration statement showing all of the assets of the issuer, the nature and cost thereof, whenever determinable, in such detail and in such form as the Commission shall prescribe (with intangible items segregated), including any loan in excess of $20,000 to any officer, director, stockholder or person directly or indirectly controlling or controlled by the issuer, or person under direct or indirect common control with the issuer. All the liabilities of the issuer in such detail and such form as the Commission shall prescribe, including surplus of the issuer showing how and from what sources such surplus was created, all as of a date not more than ninety days prior to the filing of the registration statement. If such statement be not certified by an independent public or certified accountant, in addition to the balance sheet required to be submitted under this schedule, a similar detailed balance sheet of the assets and liabilities of the issuer, certified by an independent

public or certified accountant, of a date not more than one year prior to the filing of the registration statement, shall be submitted;

(26) a profit and loss statement of the issuer showing earnings and income, the nature and source thereof, and the expenses and fixed charges in such detail and such form as the Commission shall prescribe for the latest fiscal year for which such statement is available and for the two preceding fiscal years, year by year, or, if such issuer has been in actual business for less than three years, then for such time as the issuer has been in actual business, year by year. If the date of the filing of the registration statement is more than six months after the close of the last fiscal year, a statement from such closing date to the latest practicable date. Such statement shall show what the practice of the issuer has been during the three years or lesser period as to the character of the charges, dividends or other distributions made against its various surplus accounts, and as to depreciation, depletion, and maintenance charges, in such detail and form as the Commission shall prescribe, and if stock dividends or avails from the sale of rights have been credited to income, they shall be shown separately with a statement of the basis upon which the credit is computed. Such statement shall also differentiate between any recurring and nonrecurring income and between any investment and operating income. Such statement shall be certified by an independent public or certified accountant;

(27) if the proceeds, or any part of the proceeds, of the security to be issued is to be applied directly or indirectly to the purchase of any business, a profit and loss statement of such business certified by an independent public or certified accountant, meeting the requirements of paragraph (26) of this schedule, for the three preceding fiscal years, together with a balance sheet, similarly certified, of such business, meeting the requirements of paragraph (25) of this schedule of a date not more than ninety days prior to the filing of the registration statement or at the date such business was required by the issuer if the business was acquired by the issuer more than ninety days prior to the filing of the registration statement;

(28) a copy of any agreement or agreements (or if identic agreements are used the forms thereof) made with any underwriter, including all contracts and agreements referred to in paragraph (17) of this schedule;

(29) a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation of such opinion, when necessary, into the English language;

(30) a copy of all material contracts referred to in paragraph (24) of this schedule, but no disclosure shall be required of any portion of any such contract if the Commission determines that disclosure of such portion would impair the value of the contract and would not be necessary for the protection of the investors;

(31) unless previously filed and registered under the provisions of this title, and brought up to date, (a) a copy of its articles of incorporation, with all amendments thereof and of its existing by-laws or instruments corresponding thereto, whatever the name, if the issuer be a corporation; (b) copy of all instruments by which the trust is created or declared, if the issuer is a trust; (c) a copy of its articles of partnership or association and all other papers

pertaining to its organization, if the issuer is a partnership, unincorporated association, joint-stock company, or any other form of organization; and

(32) a copy of the underlying agreements or indentures affecting any stock, bonds, or debentures offered or to be offered.

In case of certificates of deposit, voting trust certificates, collateral trust certificates, certificates of interest or shares in unincorporated investment trusts, equipment trust certificates, interim or other receipts for certificates, and like securities, the Commission shall establish rules and regulations requiring the submission of information of a like character applicable to such cases, together with such other information as it may deem appropriate and necessary regarding the character, financial or otherwise, of the actual issuer of the securities and/or the person performing the acts and assuming the duties of depositor or manager.

SCHEDULE B

(1) Name of borrowing government or subdivision thereof;

(2) specific purposes in detail and the approximate amounts to be devoted to such purposes, so far as determinable, for which the security to be offered is to supply funds, and if the funds are to be raised in part from other sources, the amounts thereof and the sources thereof, shall be stated;

(3) the amount of the funded debt and the estimated amount of the floating debt outstanding and to be created by the security to be offered, excluding intergovernmental debt, and a brief description of the date, maturity, character of such debt, rate of interest, character of amortization provisions, and the security, if any, therefor. If substitution of any security is permissible, a statement of the conditions under which such substitution is permitted. If substitution is permissible without notice, a specific statement to that effect;

(4) whether or not the issuer or its predecessor has, within a period of twenty years prior to the filing of the registration statement, defaulted on the principal or interest of any external security, excluding intergovernmental debt, and, if so, the date, amount, and circumstances of such default, and the terms of the succeeding arrangement, if any;

(5) the receipts, classified by source, and the expenditures, classified by purpose, in such detail and form as the Commission shall prescribe for the latest fiscal year for which such information is available and the two preceding fiscal years, year by year;

(6) the names and addresses of the underwriters;

(7) the name and address of its authorized agent, if any, in the United States;

(8) the estimated net proceeds to be derived from the sale in the United States of the security to be offered;

(9) the price at which it is proposed that the security shall be offered in the United States to the public or the method by which such price is computed. A variation in price may be proposed prior to the date of the public offering of the security, but the Commission shall immediately be notified of such variation;

(10) all commissions paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered. Commissions shall include all cash, securities, contracts, or anything else of value, paid, to be set aside, disposed of, or understandings with or for the benefit of any other persons in which the underwriter is interested, made, in connection with the sale of such security. Where any such commission is paid, the amount of such commission paid to each underwriter shall be stated;

(11) the amount or estimated amounts, itemized in reasonable detail, of expenses, other than the commissions specified in paragraph (10) of this schedule, incurred or borne by or for the account of the issuer in connection with the sale of the security to be offered or properly chargeable thereto, including legal, engineering, certification, and other charges;

(12) the names and addresses of counsel who have passed upon the legality of the issue;

(13) a copy of any agreement or agreements made with any underwriter governing the sale of the security within the United States; and

(14) an agreement of the issuer to furnish a copy of the opinion or opinions of counsel in respect to the legality of the issue, with a translation, where necessary, into the English language. Such opinion shall set out in full all laws, decrees, ordinances, or other acts of Government under which the issue of such security has been authorized.

TITLE II

SECTION 201. For the purpose of protecting, conserving, and advancing the interests of the holders of foreign securities in default, there is hereby created a body corporate with the name "Corporation of Foreign Security Holders" (herein called the "Corporation"). The principal office of the Corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors.

SEC. 202. The control and management of the Corporation shall be vested in a board of six directors, who shall be appointed and hold office in the following manner: As soon as practicable after the date this Act takes effect the Federal Trade Commission (hereinafter in this title called "Commission") shall appoint six directors, and shall designate a chairman and a vice chairman from among their number. After the directors designated as chairman and vice chairman cease to be directors, their successors as chairman and vice chairman shall be elected by the board of directors itself. Of the directors first appointed, two shall continue in office for a term of two years, two for a term of four years, and two for a term of six years, from the date this Act takes effect, the term of each to be designated by the Commission at the time of appointment. Their successors shall be appointed by the Commission, each for a term of six years from the date of the expiration of the term for which his predecessor was appointed, except that any person appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unex-

pired term of such predecessor. No person shall be eligible to serve as a director who within the five years preceding has had any interest, direct or indirect, in any corporation, company, partnership, bank or association which has sold, or offered for sale any foreign securities. The office of a director shall be vacated if the board of directors shall at a meeting specially convened for that purpose by resolution passed by a majority of at least two-thirds of the board of directors, remove such member from office, provided that the member whom it is proposed to remove shall have seven days' notice sent to him of such meeting and that he may be heard.

SEC. 203. The Corporation shall have power to adopt, alter, and use a corporate seal; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to require from trustees, financial agents, or dealers in foreign securities information relative to the original or present holders of foreign securities and such other information as may be required and to issue subpenas therefor; to take over the functions of any fiscal and paying agents of any foreign securities in default; to borrow money for the purposes of this title, and to pledge as collateral for such loans any securities deposited with the Corporation pursuant to this title; by and with the consent and approval of the Commission to select, employ, and fix the compensation of officers, directors, members of committees, employees, attorneys, and agents of the Corporation, without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, bylaws, rules, and regulations governing the manner in which its general business may be conducted and the powers granted to it by law may be exercised and enjoyed, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this title. The board of directors of the Corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid.

SEC. 204. The board of directors may—

(1) Convene meetings of holders of foreign securities.

(2) Invite the deposit and undertake the custody of foreign securities which have defaulted in the payment either of principal or interest, and issue receipts or certificates in the place of securities so deposited.

(3) Appoint committees from the directors of the Corporation and/or all other persons to represent holders of any class or classes of foreign securities which have defaulted in the payment either of principal or interest and determine and regulate the functions of such committees. The chairman and vice chairman of the board of directors shall be ex officio chairman and vice chairman of each committee.

(4) Negotiate and carry out, or assist in negotiating and carrying out, arrangements for the resumption of payments due or in arrears in respect of any foreign securities in default or for rearranging the

terms on which such securities may in future be held or for converting and exchanging the same for new securities or for any other object in relation thereto; and under this paragraph any plan or agreement made with respect to such securities shall be binding upon depositors, providing that the consent of holders resident in the United States of 60 per centum of the securities deposited with the Corporation shall be obtained.

(5) Undertake, superintend, or take part in the collection and application of funds derived from foreign securities which come into the possession of or under the control or management of the Corporation.

(6) Collect, preserve, publish, circulate, and render available in readily accessible form, when deemed essential or necessary, documents, statistics, reports, and information of all kinds in respect of foreign securities, including particularly records of foreign external securities in default and records of the progress made toward the payment of past-due obligations.

(7) Take such steps as it may deem expedient with the view of securing the adoption of clear and simple forms of foreign securities and just and sound principles in the conditions and terms thereof.

(8) Generally, act in the name and on behalf of the holders of foreign securities the care of representation of whose interests may be entrusted to the Corporation; conserve and protect the rights and interests of holders of foreign securities issued, sold, or owned in the United States; adopt measures for the protection, vindication, and preservation or reservation of the rights and interests of holders of foreign securities either on any default in or on breach or contemplated breach of the conditions on which such foreign securities may have been issued, or otherwise; obtain for such holders such legal and other assistance and advice as the board of directors may deem expedient; and to do all such other things as are incident or conducive to the attainment of the above objects.

SEC. 205. The board of directors shall cause accounts to be kept of all matters relating to or connected with the transactions and business of the Corporation, and cause a general account and balance sheet of the Corporation to be made out in each year, and cause all accounts to be audited by one or more auditors who shall examine the same and report thereon to the board of directors.

SEC. 206. The Corporation shall make, print, and make public an annual report of its operations during each year, send a copy thereof, together with a copy of the account and balance sheet and auditor's report, to the Commission and to both Houses of Congress, and provide one copy of such report but not more than one on the application of any person and on receipt of a sum not exceeding $1: *Provided*, That the board of directors in its discretion may distribute copies gratuitously.

SEC. 207. The Corporation may in its discretion levy charges, assessed on a pro rata basis, on the holders of foreign securities deposited with it: *Provided*, That any charge levied at the time of depositing securities with the Corporation shall not exceed one-fifth of 1 per centum of the face value of such securities: *Provided further*, That any additional charges shall bear a close relationship to the cost of operations and negotiations including those enumerated

in sections 203 and 204 and shall not exceed 1 per centum of the face value of such securities.

SEC. 208. The Corporation may receive subscriptions from any person, foundation with a public purpose, or agency of the United States Goverment, and such subscriptions may, in the discretion of the board of directors, be treated as loans repayable when and as the board of directors shall determine.

SEC. 209. The Reconstruction Finance Corporation is hereby authorized to loan out of its funds not to exceed $75,000 for the use of the Corporation.

SEC. 210. Notwithstanding the foregoing provisions of this title, it shall be unlawful for, and nothing in this title shall be taken or construed as permitting or authorizing, the Corporation in this title created, or any committee of said Corporation, or any person or persons acting for or representing or purporting to represent it—

(a) to claim or assert or pretend to be acting for or to represent the Department of State or the United States Government;

(b) to make any statements or representations of any kind to any foreign government or its officials or the officials of any political subdivision of any foreign government that said Corporation or any committee thereof or any individual or individuals connected therewith were speaking or acting for the said Department of State or the United States Government; or

(c) to do any act directly or indirectly which would interfere with or obstruct or hinder or which might be calculated to obstruct, hinder or interfere with the policy or policies of the said Department of State or the Government of the United States or any pending or contemplated diplomatic negotiations, arrangements, business or exchanges between the Government of the United States or said Department of State and any foreign government or any political subdivision thereof.

SEC. 211. This title shall not take effect until the President finds that its taking effect is in the public interest and by proclamation so declares.

SEC. 212. This title may be cited as the "Corporation of Foreign Bondholders Act, 1933."

Approved May 27th 1933.

APPENDIX

Provisions of Federal Laws Relating to the SECURITIES ACT OF 1933 as Amended

I. EXEMPTIONS

In addition to Sections 3 and 4 of the Securities Act of 1933, as amended, the following should be considered:

A. Section 264 of the National Bankruptcy Act, as amended June 22, 1938 (c. 575, § 1, 52 Stat. 902) :[1]

"a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—

"(1) any security issued by the receiver, trustee, or debtor in possession pursuant to paragraph (2) of section 116[2] of this Act; or

"(2) any transaction in any security issued pursuant to a plan in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (a) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the plan, and (b) transactions by a dealer as to securities constituting the whole or a part of an unsold allot-

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[1] Sec. 7 of the amendatory Act provides that the Act shall "take effect and be in force on and after three months from the date of its approval." Sec. 276. c. provides as follows with respect to pending proceedings under secs. 77A and 77B of the Bankruptcy Act:

"c. the provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

"(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and

"(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable; and * * *."

[2] Par. (2) of sec. 116 of the Bankruptcy Act, as amended June 22, 1938, c. 575, § 1, 52 Stat. 885:

"SEC. 116. Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—

* * * * * * *

"(2) authorize a receiver, trustee, or debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to issue certificates of indebtedness for cash, property, or other consideration approved by the judge, upon such terms and conditions and with such security and priority in payment over existing obligations, secured or unsecured, as in the particular case may be equitable;"

ment to or subscription by such dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the plan.

"b. As used in this section, the terms 'security,' 'issuer,' 'underwriter,' and 'dealer' shall have the meanings provided in Section 2 of the Securities Act of 1933, and the term 'Securities Act of 1933' shall be deemed to refer to such Act as heretofore or hereafter amended."

[NOTE: Sec. 264, which is contained in chap. X of the amendatory Act entitled "Corporate Reorganization," is to replace the following excerpt from subdivision (h) of sec. 77B of the Bankruptcy Act as contained in c. 424, 48 Stat. 920, approved June 7, 1934:

"* * * All securities issued pursuant to any plan of reorganization confirmed by the court in accordance with the provisions of this section, including, without limiting the generality of the foregoing, any securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan and securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3), of this section, and all certificates of deposit representing securities of or claims against the debtor which it is proposed to deal with under any such plan, shall be exempt from all the provisions of the Securities Act of 1933, approved May 27, 1933, except the provisions of subdivision (2) of section 12, and section 17 thereof, and except the provisions of section 24 thereof as applied to any willful violation of said section 17."

Subdivision (c), clause (3), referred to in the above excerpt from sec. 77B, reads as follows:

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, * * * (3) may, for cause shown, authorize the debtor or the trustee or trustees, if appointed, to issue certificates for cash, property, or other consideration approved by the judge for such lawful purposes, and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, as may be lawful in the particular case; * * *."

The effect of sec. 264 and its relation to sec. 77B (h) is discussed in the following excerpt from S. Rept. No. 1916, 75th Cong. (3d sess.), at p. 38:

"Section 264 is derived in part from section 77B (h). Under this provision no registration in compliance with the Securities Act of 1933 is required for the issuance of securities to the security holders or creditors of the debtor in whole or part exchange for their old securities or claims. However, new issues sold by the reorganized company for cash are required to be registered under the Securities Act just as any other new issues of securities, in order that prospective investors may have all material information before buying. Furthermore, the exemption for the issuance of securities to security holders and creditors under the plan does not extend to any subsequent redistribution of such securities by the issuer or an underwriter; for any such redistribution is subject to the same need for public disclosure of relevant data as in the case of a new issue. This need for registration upon redistribution has been recognized by the Securities and Exchange Commission in its interpretation of section 77B (h), but the revision embodied in section 264 is designed to remove all doubt as to the correctness of that interpretation."]

B. Section 393 of the National Bankruptcy Act, as amended June 22, 1938, c. 575, § 1, 52 Stat. 914:

"a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—

"(1) any security issued by a receiver, trustee, or debtor in possession pursuant to section 344 of this Act;[3] or

"(2) any transaction in any security issued pursuant to an arrangement in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (a) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and (b) transactions by a dealer as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the arrangement.

"b. As used in this section, the terms 'security,' 'issuer,' 'underwriter,' and 'dealer' shall have the meanings provided in section 2 of the Securities Act of 1933, and the term 'Securities Act of 1933' shall be deemed to refer to such Act as heretofore or hereafter amended."

[NOTE: Sec. 393 is contained in chap. XI of the amendatory Act, entitled "Arrangements."]

C. Section 518 of the National Bankruptcy Act, as amended June 22, 1938, c. 575, § 1, 52 Stat. 928, Public No. 696, 75th Congress, approved June 22, 1938:

"a. The provisions of section 5 of the Securities Act of 1933 shall not apply to—

"(1) any security issued by a trustee or debtor in possession pursuant to section 446 of this Act;[4] or

"(2) any transaction in any security issued pursuant to an arrangement in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issues upon exercise of any right to subscribe or conversion privilege so issued, except (a) transactions by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and (b) transactions by a dealer as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in a distribution of such securities by the

[3] Sec. 344 of the Act, referred to in sec. 393, a. (1), reads as follows:

"SEC. 344. During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the receiver or trustee, or the debtor in possession, to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable."

[4] Sec. 446, referred to in sec. 518, reads as follows:

"SEC. 446. During the pendency of a proceeding for an arrangement, or after the confirmation of the arrangement where the court has retained jurisdiction, the court may upon cause shown authorize the trustee or debtor in possession to issue certificates of indebtedness for cash, property, or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable."

issuer or by or through an underwriter otherwise than pursuant to the arrangement.

"b. As used in this section, the terms 'security,' 'issuer,' 'underwriter,' and 'dealer' shall have the meanings provided in section 2 of the Securities Act of 1933, and the term 'Securities Act of 1933' shall be deemed to refer to such Act as heretofore or hereafter amended."

[NOTE: Sec. 518 is contained in chap. XII of the amended Act entitled "Real Property Arrangements by Persons other than Corporations."]

D. Excerpt from subdivision (f) of section 77 of the Bankruptcy Act, as amended August 27, 1935 (c. 774, 49 Stat. 920):

"* * * The provisions of title I and of section 5 of the Securities Act of 1933, as amended, shall not apply to the issuance, sale, or exchange of any of the following securities, which securities and transactions therein shall, for the purposes of said Securities Act, be treated as if they were specifically mentioned in sections 3 and 4 of the said Securities Act, respectively: (1) All securities issued pursuant to any plan of reorganization confirmed by the judge in accordance with the provisions of this section; (2) all securities issued pursuant to such plan for the purpose of raising money for working capital and other purposes of such plan; (3) all securities issued by the debtor or by the trustee or trustees pursuant to subdivision (c), clause (3) of this section;[5] (4) all certificates of deposit representing securities of, or claims against, the debtor, with the exception of such certificates of deposit as are issued by committees not subject to subsection (p) hereof. The provisions of subdivision (a) of section (14) of the Securities Exchange Act of 1934 shall not be applicable with respect to any action or matter which is within the provisions of subsection (p) hereof."[6]

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[5] Subdivision (c), clause (3), referred to in the above excerpt, reads as follows:

"(c) After approving the petition:

* * * * * * *

"(3) The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the Commission [Interstate Commerce Commission], in accordance with section 20 (a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property, or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful."

[6] Subsection (p), referred to in the above excerpt, reads as follows:

"(p) It shall be unlawful for any person, during the pendency of proceedings under this section or of receivership proceedings against a railroad corporation in any State or Federal court, (a) to solicit, or permit the use of his name to solicit, from any creditor or shareholder of any railroad corporation by or against whom such proceedings have been instituted, any proxy or authorization to represent any such creditor or shareholder in such proceedings or in any matters relating to such proceedings, or to vote on his behalf for or against, or to consent to or reject, any plan of reorganization proposed in connection with such proceedings; or (b) to use, employ, or act under or pursuant to any such proxy or authorization from any such creditor or shareholder which has been solicited or obtained prior to the institution of such proceedings; or (c) to solicit the deposit by any such creditor, or shareholder, of his claim against or interest in such railroad corporation, or any instrument evidencing the same, under any agreement authorizing anyone other than such depositor to represent such depositor in such proceedings or in any matters relating to such proceedings, including any matters relating to the deposited security or claim; or to vote such claim or interest or to consent to or reject

E. Section 3 (a) (6) of the Securities Act exempts from the registration provisions of that act "any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act, as amended:"

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any such plan of reorganization; or (d) to use, employ, or act under or pursuant to any such agreement with such depositor which has been solicited or obtained prior to the institution of such proceedings; unless and until, upon proper application by any person proposing to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, and after consideration of the terms and conditions (including provisions governing the compensation and expenses to be received by the applicant, its agents and attorneys, for their services) upon which it is proposed to make such solicitation or to use, employ, or act under or pursuant to such proxies, authorizations, or deposit agreements, the Commission [Interstate Commerce Commission] after hearing by order authorizes such solicitation, use, employment, or action: *Provided, however,* That nothing contained in this section shall be applicable to or construed to prohibit any person, when not part of an organized effort, from acting in his own interest, and not for the interest of any other, through a representative or otherwise, or from authorizing a representative to act for him in any of the foregoing matters, or to prohibit groups of not more than twenty-five bona fide holders of securities or claims or groups of mutual institutions from acting together for their own interests and not for others through representatives or otherwise or from authorizing representatives of such groups to act for them in respect to any of the foregoing matters. The Commission shall make such order only if it finds that the terms and conditions upon which such solicitation, use, employment, or action is proposed are reasonable, fair, and in the public interest, and conform to such rules and regulations as the Commission may provide. The Commission shall have the power to make such rules and regulations respecting such solicitation, use, employment, or action and with respect to the terms and the provisions of such proxies, authorizations, and deposit agreements, and with respect to such other matters in connection with the administration of this subsection as it deems necessary or desirable to promote the public interest, and to insure proper practices in the representation of creditors and stockholders through the use of such proxies, authorizations, or deposit agreements and in the solicitation thereof. It shall be unlawful for any person to solicit any such proxy, authorization, or the deposit of any such claim or interest or to use, employ, or act under or pursuant to any such proxy, authorization, or deposit agreement which has been solicited or obtained prior to the institution of such proceedings in violation of the rules and regulations so prescribed.

"Every application for authority shall be made in such form and contain such matters as the Commission may prescribe. Every such application shall be made under oath, signed by, or on behalf of, the applicant by a duly authorized agent having knowledge of the matters therein set forth. The Commission may modify any order authorizing such solicitation, use, employment, or action by a supplemental order, but no such modification shall invalidate action previously taken, or rights or obligations which have previously arisen, in conformity with the Commission's prior order or orders authorizing such solicitation, use, employment, or action.

"The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this subsection (p) or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath, or otherwise, as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any such facts, conditions, practices, or matters as it may deem necessary or proper to aid in the enforcement of the provisions of this subsection (p), in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this subsection relates.

"Any person who willfully violates any provision of this subsection, or any rule or regulation made thereunder the violation of which is made unlawful, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed hereunder or under any rule or regulation authorized hereby, which statement is false or misleading with respect to any material fact, shall be guilty of a misdemeanor, and on conviction in any United States court having jurisdiction, shall be punished by a fine of not less than $1,000 nor more than $10,000 or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court; but no person shall be subject to imprison-

Section 20a of the Interstate Commerce Act defines carriers as follows:

> "(1) *Carrier defined.*—As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter."

Subsection (2) of section 20a describes the securities which are subject to the jurisdiction of the Interstate Commerce Commission as follows:

> "§ 20a. (2) *Issuance of securities; assumption of obligations; authorization.*—It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

In addition to the carriers whose securities were originally subject to the jurisdiction of the Interstate Commerce Commission under sec-

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ment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

"The provisions of this subsection (p) shall not be applicable to any person or committee which has begun to solicit, obtain, or use proxies, authorizations, or deposit agreements prior to the effective date of this amendatory section in connection with proceedings under this section as in force prior to such effective date or receivership proceedings against a railroad then pending in any State or Federal court, unless such person or committee makes application to the Commission and receives authority to act as in this subsection provided, in which event the provisions of this subsection (p) shall be applicable to such person or committee, but such authorization shall not be upon terms which shall invalidate any action theretofore taken, or any rights or obligations which have theretofore arisen: *Provided*, That with respect to committees which are not subject to this subsection (p) the judge shall scrutinize and may disregard any limitations or provisions of any deposit agreements, committee, or other authorizations affecting any creditor or stockholder acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he finds to be unfair or not consistent with public policy, including the collection of unreasonable amounts for compensation and expenses."

tion 20a, section 214 of the Motor Carrier Act of 1935 (approved August 9, 1935; 49 Stat. 543, amended June 29, 1938, c. 811, § 15; 52 Stat. 1240) added the following classification:

"Common and contract carriers by motor vehicle, corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order entered under section 213 (a) (1) to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs 2 to 11, inclusive, of section 20a of part I of this Act (including penalties applicable in cases of violations thereof): *Provided, however*, That said provisions shall not apply to such carriers or corporations where the par value of the securities to be issued, together with the par value of the securities then outstanding, does not exceed $500,000. Nor to the issuance of notes of a maturity of two years or less and aggregating not more than $100,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of securities having no par value, the par value for the purpose of this section shall be the fair market value as of the date of their issue: *Provided further*, That the exemption in section 3 (a) (6) of the 'Securities Act of 1933,' is hereby amended to read as follows: (6) Any security issued by a common or contract carrier, the issuance of which is subject to the provisions of section 20a of the Interstate Commerce Act as amended;"

[NOTE: Consideration should be given to sec. 705 (5) of chap. XV of the National Bankruptcy Act as amended by Public No. 242, 76th Cong., approved July 28, 1939, dealing with railroad adjustments, which provides that for the purposes of that chapter the term "securities" shall include, in addition to those defined in sec. 20a of the Interstate Commerce Act, certificates of deposit and all other evidences of ownership of or interest in securities.]

F. Subdivision (5) of subsection (a) of section 304 of the Trust Indenture Act of 1939 (see below):

SEC. 304 (a). The provisions of this title shall not apply to any of the following securities:

* * * * * * *

"(5) any security issued under a mortgage indenture as to which a contract of insurance under the National Housing Act is in effect; and any such security shall be deemed to be exempt from the provisions of the Securities Act of 1933 to the same extent as though such security were specifically enumerated in section 3 (a) (2) of such Act; * * *."

G. Section 24 (d) of the Investment Company Act of 1940 (Public No. 768, 76th Congress, approved August 22, 1940):

"The exemption provided by paragraph 8 of Section 3 (a) of the Securities Act of 1933 shall not apply to any security

of which an investment company [7] is the issuer. The exemption provided by paragraph 11 of said Section 3 (a) shall not apply to any security of which a registered investment company [8] is the issuer, except a security sold or disposed of by the issuer or bona fide offered to the public prior to the effective date of this title,[9] and with respect to a security so sold, disposed of or offered shall not apply to the new offering thereof on or after the effective date of this title." [9]

II. REGISTRATION STATEMENTS

A. The Trust Indenture Act of 1939 (Public No. 253, 76th Cong., approved August 3, 1939) requires that bonds, notes, debentures and similar securities publicly offered for sale, sold, or delivered after sale through the mails or interstate commerce (except as specifically exempted by the act) be issued under an indenture which meets the requirements of the act and has been duly qualified with the Securities and Exchange Commission. With respect to such securities the requirements of both the Trust Indenture Act of 1939 and the Securities Act of 1933 must be considered.

B. In addition to sections 6 and 7 of the Securities Act of 1933, as amended, the following should also be considered:

1. Section 204 (h) of the Federal Water Power Act, as amended by section 213 of title II of the Public Utility Act of 1935, Public No. 333, 74th Congress, approved August 26, 1935:

> "(h) Any public utility whose security issues are approved by the Commission under this section may file with the Securities and Exchange Commission duplicate copies of reports filed with the Federal Power Commission in lieu of the reports, information, and documents required under section 7 of the Securities Act of 1933 and sections 12 and 13 of the Securities Exchange Act of 1934."

2. Section 24 (a) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

> "In registering under the Securities Act of 1933 any security of which it is the issuer, a registered investment company, in lieu of furnishing a registration statement containing the information and documents specified in Schedule A of said Act, may file a registration statement containing the following information and documents:
>
> > "(1) such copies of the registration statement filed by such company under this title, and of such reports filed by such company pursuant to Section 30 or such copies

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[7] The term "investment company" is defined in Section 3 of the Investment Company Act of 1940.

[8] The term "investment company" is defined in Section 3 of the Investment Company Act of 1940. A registered investment company is an investment company registered under Section 8 of the Act.

[9] Section 53 of the Investment Company Act makes the Act effective on November 1, 1940, except that in the case of face amount certificates and face amount certificate companies, as defined in Sections 2 (a) (15) and 4 (1) of the Act, the effective date is January 1, 1941.

of portions of such registration statement and reports, as the Commission shall designate by rules and regulations; and

"(2) such additional information and documents (including a prospectus) as the Commission shall prescribe by rules and regulations as necessary or appropriate in the public interest or for the protection of investors."

3. Section 38 (b) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

"The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors, may authorize the filing of any information or documents required to be filed with the Commission under this title, Title II of this Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935, or the Trust Indenture Act of 1939, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this title or any of such Acts."

4. Section 308 of the Trust Indenture Act of 1939, Public No. 253, 76th Congress, approved August 3, 1939:

"(a) The Commission, by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, shall authorize the filing of information or documents required to be filed with the Commission under this title, or under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Public Utility Holding Company Act of 1935, by incorporating by reference any information or documents on file with the Commission under this title or under any such Act."

5. Subsection (d) of section 15 of the Securities Exchange Act of 1934, as amended by section 3 of Public No. 621, 74th Congress, approved May 27, 1936:

"(d) Each registration statement hereafter filed pursuant to the Securities Act of 1933, as amended, shall contain an undertaking by the issuer of the issue of securities to which the registration statement relates to file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, such supplementary and periodic information, documents, and reports as may be required pursuant to Section 13 of this title in respect of a security listed and registered on a national securities exchange; but such undertaking shall become operative only if the aggregate offering price of such issue of securities, plus the aggregate value of all other securities of such issuer of the same class (as hereinafter defined) outstanding, computed upon the basis of such offering price, amounts to $2,000,000 or more. The issuer shall file such supplementary and periodic information, documents, and reports pursuant to such undertaking, except that the duty to file shall be automatically suspended if and so long as (1) such

issue of securities is listed and registered on a national securities exchange, or (2) by reason of the listing and registration of any other security of such issuer on a national securities exchange, such issuer is required to file pursuant to Section 13 of this title, information, documents, and reports substantially equivalent to such as would be required if such issue of securities were listed and registered on a national securities exchange, or (3) the aggregate value of all outstanding securities of the class to which such issue belongs is reduced to less than $1,000,000, computed upon the basis of the offering price of the last issue of securities of said class offered to the public. For the purposes of this subsection, the term 'class' shall be construed to include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. Nothing in this subsection shall apply to securities issued by a foreign government or political subdivision thereof or to any other security which the Commission may by rules and regulations exempt as not comprehended within the purposes of this subsection."

[NOTE: The various penalties imposed upon failure to perform the undertakings provided for by section 15 (d) of the Securities Exchange Act of 1934, or for filing false statements in connection therewith, are contained in sections 21 (f) and 32 (a) and (b) of said Act.]

C. In addition to section 10 of the Securities Act of 1933, as amended, the following should also be considered in relation to certain investment company securities:

Section 24 (c) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

"In addition to the powers relative to prospectuses granted the Commission by Section 10 of the Securities Act of 1933, the Commission is authorized to require, by rules and regulations or order, that the information contained in any prospectus relating to any periodic payment plan certificate or face-amount certificate registered under the Securities Act of 1933 on or after the effective date of this title be presented in such form and order of items, and such prospectus contain such summaries of any portion of such information, as are necessary or appropriate in the public interest or for the protection of investors."

D. The following should be considered in connection with the application of section 8 (d):

Section 14 (a) of the Investment Company Act of 1940, Public No. 768, 76th Congress, approved August 22, 1940:

"No registered investment company organized after the date of enactment of this title, and no principal underwriter for such a company, shall make a public offering of securities of which such company is the issuer, unless—

"(1) such company has a net worth of at least $100,000;

"(2) such company has previously made a public offering of its securities, and at the time of such offering had a net worth of at least $100,000; or

"(3) provision is made in connection with and as a condition of the registration of such securities under the Securities Act of 1933 which in the opinion of the Commission adequately insures (A) that after the effective date of such registration statement such company will not issue any security or receive any proceeds of any subscription for any security until firm agreements have been made with such company by not more than twenty-five responsible persons to purchase from it securities to be issued by it for an aggregate net amount which plus the then net worth of the company, if any, will equal at least $100,000; (B) that said aggregate net amount will be paid in to such company before any subscription for such securities will be accepted from any persons in excess of twenty-five; (C) that arrangements will be made whereby any proceeds so paid in, as well as any sales load, will be refunded to any subscriber on demand without any deduction, in the event that the net proceeds so received by the company do not result in the company having a net worth of at least $100,000 within ninety days after such registration statement becomes effective.

"At any time after the occurrence of the event specified in Clause (C) of paragraph (3) of this subsection the Commission may issue a stop order suspending the effectiveness of the registration statement of such securities under the Securities Act of 1933 and may suspend or revoke the registration of such company under this title."

E. Section 308 of the Trust Indenture Act of 1939, Public No. 253, 76th Congress, approved August 3, 1939:

"(b) The Commission, by such rules and regulations or orders as it deems necessary or appropriate in the public interest or for the protection of investors, shall provide for the consolidation of applications, reports and proceedings under this title with registration statements, applications, reports, and proceedings under the Securities Act of 1933, the Securities Exchange Act of 1934, or the Public Utility Holding Company Act of 1935."

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No. 9916

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Statement of Facts.

Consolidated Mines of California is a California corporation organized under the laws of the State of California with a valid permit from the Commissioner of Corporations of the State of California to sell stock [R. 188]. Within the State of California was the only place where sales were consummated [R. 188]. The officers of the company were Henry L. Wikoff, president; Frank S. Tyler, secretary, and W. J. Morgan, executive vice president [R. 194].

To secure a permit under the laws of the State of California Section 4 of the Corporate Securities Act of California, Act 3814, General Laws, pages 1768, 1772, Deer-

ing's Code, with which the Consolidated Mines of California complied, provides as follows:

> *"Investigation of application: Issuance of permit: Contents of permit: Replacement securities: Action as escrow holder.* Upon the filing of such application, it shall be the duty of the commissioner to examine it and the other papers and documents filed therewith, and he may, if he deems it advisable, make or have made a detailed examination, audit and investigation of the applicant and its affairs. If he finds that the proposed plan of business of the applicant *is not unfair, unjust, or inequitable, that it intends to fairly and honestly transact its business,* and that the securities that it proposes to issue and the method to be used by it in issuing or disposing of them *are not such as, in his opinion, will work a fraud upon the purchaser thereof,* the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this State, in such amounts and for such considerations and upon such terms and conditions as the commissioner may in said permit provide. Otherwise, he shall deny the application and refuse such permit and notify the applicant in writing of his decision. Every permit shall recite in bold type that the issuance thereof is permissive only and does not constitute a recommendation or endorsement of the securities permitted to be issued. The commissioner may impose conditions requiring the deposit in escrow of securities, the impoundment of the proceeds from the sale thereof, limiting the expense in connection with the sale thereof and such other conditions as he may deem reasonable and necessary or advisable to insure the disposition of the proceeds of such securities in the manner and for the purposes provided in such permit." (Italics ours.)

This section was complied with and the Corporation Commissioner of California by the issuance of the permit found the proposed plan of business to be fair, just and equitable.

The appellant William Jackson Shaw was neither an officer nor a director nor an official nor employee of Consolidated Mines of California.

Back in 1932 a committee was organized of various stockholders of the Monolith Portland Cement Company, for the purpose of propagating a suit against Coy Burnett, one of the officers of the Monolith Company, on the grounds of misrepresentation and misappropriation of funds [R. 133, 135, 136]. The appellant was an investigator for the committee [R. 136]. Members of the committee were Mr. Harding, Mr. Lagrange and Mr. Morgan. Through the efforts of this committee and appellant a recovery suit was started which resulted in a judgment of $820,000 [R. 159]. This money was distributed to the company but the stockholders were not satisfied to hold the Monolith stock because of the difficulties they had had.

Thereafter, Frank Tyler, a member of the Monolith Committee, who owned three mines in California known as the McKisson, Grand Prize and Mineral Lode, turned these miles into the Consolidated Mines of California in exchange for 450,000 shares of no par value stock of which 300,000 shares were to be placed in escrow, and 150,000 shares were issued to Mr. Tyler [R. 279, 280] as his personal stock.

Mr. Tyler also filed with the Corporation Commissioner of the State of California a partnership agreement which he had with various persons, and he was authorized to issue 20,000 shares to these persons out of his stock [R. 282, 283].

The Consolidated Mines of California, a California corporation, was operating a mine 21 miles east of Jackson, Calaveras County, California. It was incorporated for one million shares of no par value stock and 150,000 shares had been authorized for issuance with no treasury stock for sale.

The Corporation Commissioner granted a permit to sell and issue 150,000 shares of stock and to keep 300,000 shares in escrow [R. 281]. Of this 150,000 shares 60,000 were issued to Frank S. Tyler and the balance to various individuals who were members of the partnership with him, in accordance with their respective interests in the partnership. That partnership agreement recited that 40 per cent of the assets of the partnership would be owned by Mr. Tyler in consideration of certain things he was to turn over, and the other 60 per cent belonged to the partners who had subscribed their names at the foot of the document.

The appellant Shaw had an agreement with Tyler to receive 80 per cent interest in any and all net income to be realized from the consideration received by Tyler for the assistance rendered to Tyler by W. J. Shaw "in the formation of that certain mining partnership entered into between myself and sundry other individuals under

date of February 6, 1934, and for certain cash advances made to me for other considerations received" [R. .....].

The three stock certificates that are involved in counts 14, 15 and 16 of the indictment, according to the testimony of Louis R. Jacobson [R. 272, 273] all came from certificate No. 666 of Consolidated Mines of California. Certificate No. 666 was originally issued to J. R. McKiver, who received 10,000 shares of stock for a valuable consideration. McKiver issued 5,000 shares of this 10,000 shares to Frank S. Tyler by certificate No. 680. Certificate No. 680 was re-issued, 4,000 shares going back to Tyler by certificate No. 716. No. 716 was divided, and from it No. 732 was issued to Dr. Homer J. Arnold and Mrs. Arnold [R. 343]. Certificate No. 716 was divided further and issued to Regina Woodruff and Mr. and Mrs. J. C. Goodrich [R. 343, 344]. The Goodrich certificate was No. 740 for 18 shares. It was from the private stock of Tyler and was at no time any part of stock issued in the partnership agreement of Frank S. Tyler and associates. McKiver gave valuable and legally sufficient consideration, as shown by the corporation stock books and the certificate of the Corporation Commissioner of the State of California [R. 344]. It was therefore personally owned stock.

Statement of the Case.

The appellant William Jackson Shaw was indicted, according to the caption thereon, for alleged violation of Section 5(a) (2), Securities Act of 1933, as amended (Title 15, United States Code, Section 77q(a) (2) Section 37, Criminal Code (Title 18, United States Code, Section 88), Section 215, Criminal Code (Title 18, United States Code, Section 338), in the United States District Court, in and for the Southern District of California, Central Division, on December 13, 1939 [R. 2 *et seq.*] The indictment charged seventeen counts, but a demurrer to count 17 charging conspiracy was sustained and the appellant was tried on sixteen counts.

While the appellant was charged with violation of Title 15, United States Code, Section 77q(a) (2), as designated in the caption, counts 14, 15 anl 16 of the indictment do not charge any violation of this section, and what section they do charge a violation of is left to conjecture from the reading of the counts of the indictment itself.

The jury, after having heard all the facts, implicitly determined by its verdict of not guilt that in so far as counts 1 to 13 were concerned, all of the representations which were made were not in violation of the Statute and that appellant was not guilty of acting fraudulently or other than in perfectly good faith and honesty. The indictment in counts 14, 15 and 16 does not involve these issues, but the mere technical failure to file a registration statement before mailing the particular stocks which were involved in counts 14, 15 and 16, if the law requires such registration. It will be amply demonstrated that the law does not require such a registration under the particular facts of this case, but the mere causing of three letters

to be mailed without a registration statement of the company having been filed. The appellant not being either an officer or director or employee of the company itself had neither a right nor a duty to file such a statement if the law required it under the facts of this case. It will be amply demonstrated that the law does not require such a registration under the facts of this case.

A general and special demurrer was filed to the indictment [R. 77 *et seq.*] There was also filed with the appellant's demurrer a plea in abatement on the grounds that the appellant had been subpoenaed to appear before the Securities and Exchange Commission and had testified before that body, and that he was required and compelled to produce books, papers and other matters before said body, and he demanded that the indictment be quashed and the issue be tried before a jury on said plea in abatement.

The Government filed a demurrer to the plea in abatement [R. 88] and motion to strike the plea in abatement. On June 14, 1940, the Government's demurrer to the plea in abatement was sustained by the trial court, passing upon it without a jury, and the Government's motion to strike was granted. Defendant's demurrer as to all counts except count 17 was overruled. The case was set down for trial by jury on June 17, 1941, at which time the defendant, in custody, stated that he was not able to hire counsel because he is a pauper, and the Court thereupon appointed C. C. Montgomery, Esq., to represent the appellant [R. 105].

The trial thereupon proceeded from day to day on all sixteen counts in the indictment. On July 9, 1941, the jury returned its verdicts of not guilty on all counts

except counts 14, 15 and 16, which charged failure to file a registration statement with the Securities and Exchange Commission for Consolidated Mines of California, on which counts the defendant was found guilty [R. 107] *and sentenced to six months in jail* on each of the counts, running concurrently [R. 112, 113].

Notice of appeal was duly and regularly given, the appellant electing not to serve his sentence pending appeal [R. 114]. Motion for a new trial as to each of the counts of which he was convicted was denied, and exception noted [R. 110, 111].

Count 14 alleges that the appellant in Los Angeles County

> "knowingly, unlawfully, willfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certificate, No. 732, for 250 shares of the capital stock of the Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Dr. Homer J. Arnold and Florence R. Arnold, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following to-wit:
>
> "Said defendants on or about December 21, 1936, caused to be delivered by the Post Office establishment of the United States according to the directions thereon a postpaid envelope addressed to Dr. Homer J. and Florence R. Arnold, 345 North Norton, Los Angeles, California, enclosing said security which said security was in the following tenor:"

Thereafter follows a copy of the stock certificate signed by H. L. Wikoff, president, Frank S. Tyler, secretary.

Count 15 charges that on or about June 3, 1937, at Los Angeles County, California, the appellant in Los Angeles County

> "did willfully, knowingly, unlawfully and feloniously cause to be delivered by the United States mails a certain security, to-wit: a certificate No. 741, for 30 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and delivery after sale of said security to Regina Woodruff, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following to-wit:
>
> "Said defendant on or about June 3, 1937, caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mrs. Regina Woodruff, 802 North Vermont, Los Angeles, California, enclosing said security which said security was of the tenor following to-wit:"

Thereafter follows a copy of the stock certificate.

Count 16 charges that the appellant in Los Angeles County on June 8, 1937,

> "willfully, knowingly, unlawfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certificate No. 742 for 18 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to J. C. and E. M. Goodrich no registration being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following to-wit:

"Said defendant on or about June 8, 1937, caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mr. J. C. and E. M. Goodrich, 4532 South Wilton Street, Los Angeles, California, enclosing said security which said security was of the tenor following to-wit:"

Thereafter follows the stock certificate.

It will be noted that each of these certificates was mailed from one address in Los Angeles to another in Los Angeles, in the same county and state. Each certificate was signed by Frank Tyler and also by the name of H. L. Wikoff.

The Monolith stock of Thomas J. Allen and Garfield Vogel were on deposit with the Pacific National Bank of San Francisco [R. 130, 162].

The evidence as to their transactions were offered as to the counts of which appellant was acquitted and cannot properly be considered as to the three counts now under attack on appeal.

With the exception of the few original committee members in the old Monolith or Midwest Company, all of the other committee members and persons lived in the State of California, and all of the other transactions were carried on within the state.

It is not claimed by the Government that there was any fraud, misrepresentation, or other wrongfulness in connection with the transactions on which the appellant was

convicted other than nonregistry with the Securities and Exchange Commission of the company. Nor is it claimed by the Government that there was not full, fair and proper disclosure of all the transactions to the proper authorities in the State of California, which disclosure to the state resulted in the issuance of a permit and the carrying on of the transactions within the state and the issuance of a permit to dispose of the stock as it was disposed of. It was appellant's contention that the stock which Tyler received not only in exchange for his mining properties and his advances but also in his dealings with McKiver became his personally owned stock by reason thereof and were not subject to the Securities and Exchange Act. The position taken by the trial court contrary to the opinion of this Court in *Consolidated Mines v. Securities Exchange Commission,* 97 F. (2d) 704, 707, was that it did not make any difference whether the stock was personally owned or not, if it was deposited in the mails without a registration statement in the Securities and Exchange Commission it was a violation of the law, and he so instructed the jury, thus removing from them the right to determine first, if it was personally owned stock, and if it was personally owned stock, if it was thereby exempt by reason of that fact.

Nowhere is it claimed by the Government that the appellant mailed the stock, but it is claimed that he *caused* it to be mailed. The evidence in this respect is challenged as insufficient.

The issues to be decided upon this appeal are these:

I.

(a) Where a corporation is duly and regularly organized under the laws of a state, and full and fair disclosure has been made of all the facts regarding the corporation to the state officials, and it is shown in the permit, to the satisfaction of the state authorities, that the transaction is fair, equitable and just to the investors, the said state authority being one authorized by law to investigate and pass upon the question and to receive full and fair disclosure and make it available to the public any time, is it a violation of the Securities Act of 1933 to use the mails in sending a letter from one place in Los Angeles to another place in Los Angeles without filing a registration statement with the Federal Securities and Exchange Commission?

(b) Where the purpose of Securities and Exchange Act is "to provide full and fair disclosure of the character of the securities sold in *interstate and foreign commerce and through the mails* and to prevent fraud in the sale thereof, and for other purposes, "is a prosecution of an individual who was neither an officer, director nor employee of a company for causing the mails to be used in **intrastate** commerce by sending stock of a state corporation duly and regularly authorized under the laws of the state, which has made a full and fair disclosure of the character of the securities sold within that state to the duly constituted authorities, authorized by the Federal Securities and Exchange Act?

(c) Is such an interpretation of the Act holding that it is a violation of the Securities and Exchange Act, an improper interpretation, since such interpretation has no reasonable relationship to the object sought by the Act?

II.

Where stock is personally owned and it is not charged that there is anything fraudulent or improper in the sale or dealings, does an act of Congress if construed to apply to the sale of such personally owned stock offend the Fifth Amendment to the Constitution of the United States holding that no person can be deprived of property without due process of law?

Does such statute impair the freedom of contract guaranteed by the Constitution?

Is such an act as construed and applied unconstitutional?

III.

Where a defendant is tried by a jury and one of the vital questions is whether he owned the stock personally, and if he did, that it would be exempt under the law, does the Court invade the province of the jury by instructing them that it is immaterial whether the stock is personally owned or not?

IV.

Where the stock generally is part of an issue sold only to persons resident within a single state or territory where the issuer of such security is a person resident and doing business within, or is a corporation incorporated by and doing business within such state or territory, is the sale of such security exempt under the act itself where the transactions which the accused is alleged to have had were all within the state and city, and where the only evidence of any other transactions is regarding isolated cases of persons who had been members of a stockholders' committee group which had had its stock in deposit within the state itself and where the transactions were finally consummated within the state?

V.

Where the only stock involved in the alleged violation was personally owned stock transferred from one owner to another and sold by the second owner, is such stock within the exemption of Section 3, Subd. 10?

VI.

Where this Court has previously held implicitly in a decision involving this company that personally owned stock is exempt is it the law of the case which the District Court is bound to follow?

VII.

Where the Court takes away from the jury the right to determine whether stock is personally owned and therefore exempt from the Securities and Exchange Act, is it an invasion of the province of the jury and reversible error?

VIII.

Where a plea in abatement is submitted to the Court and an issue of fact is raised as to whether immunity was granted by reason of the appearance by request of a person before the Securities and Exchange Commission, should the demurrer to the plea in abatement be overruled and the issue submitted for trial before a jury?

IX.

Where a person is neither an officer nor an employee of a company is the evidence sufficient to show that he caused a stock certificate to be mailed from one place in Los Angeles to another place in Los Angeles solely by reason of the fact that the certificates were mailed?

X.

Is the burden of proof upon the Government to show that the stock was not one of the exempt classifications, or can it shift that burden of proof to the defense, and is the burden of proof upon the Government to prove beyond a reasonable doubt that the defendant acted without innocent intent?

Assignment of Errors and Points Upon Which Appellant Relies in This Appeal.

I.

THE DISTRICT COURT ERRED IN OVERRULING THE DEMURRER TO THE INDICTMENT AND IN HOLDING THAT SAID INDICTMENT CHARGES A PUBLIC OFFENSE WHEN IT MERELY CHARGES CAUSING A LETTER TO BE MAILED CONTAINING STOCK OF A STATE CORPORATION DOING BUSINESS WITHIN THE STATE FROM ONE PLACE IN A COUNTY OF THE STATE TO ANOTHER PLACE IN THE SAME COUNTY.

II.

THE DISTRICT COURT ERRED IN HOLDING THAT WHERE THERE HAS BEEN FULL AND FAIR DISCLOSURE OF THE CHARACTER OF THE SECURITIES INVOLVED TO THE OFFICIALS OF THE STATE BY A STATE CORPORATION DOING ITS PRINCIPAL BUSINESS IN THAT STATE, AND THE ONLY TRANSACTIONS INVOLVED IN THE PARTICULAR CONVICTIONS WERE WITHIN A COUNTY OF THE STATE, THAT THE SECURITIES AND EXCHANGE ACT IS APPLICABLE TO THIS CASE.

III.

THE DISTRICT COURT ERRED IN HOLDING THAT THE SECURITIES AND EXCHANGE ACT APPLIES TO PERSONALLY OWNED STOCK AND IN DISREGARDING THE LAW OF THE CASE AND THIS COURT'S IMPLICIT HOLDING TO THE CONTRARY. SUCH CONSTRUCTION WOULD BE UNCONSTITUTIONAL, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND WOULD ALSO IMPAIR THE FREEDOM OF CONTRACT.

IV.

THE DISTRICT COURT ERRED IN INVADING THE PROVINCE OF THE JURY AND IN INSTRUCTING THE JURY THAT IT IS IMMATERIAL WHETHER THE STOCK IS PERSONALLY OWNED OR NOT.

V.

THE DISTRICT COURT ERRED IN HOLDING THAT THERE WAS SUFFICIENT OR ANY EVIDENCE UPON THE FACE OF THE RECORD TO SHOW THAT APPELLANT CAUSED ANY STOCK CERTIFICATES TO BE MAILED.

VI.

THE DISTRICT COURT ERRED IN HOLDING THAT WHERE A STATE CORPORATION IS DOING BUSINESS WITHIN THE STATE AND THE TRANSACTIONS INVOLVED IN THIS CASE WERE ALL DONE WITHIN A COUNTY OF THE STATE, THAT THE PARTICULAR TRANSACTIONS WERE NOT EXEMPT UNDER THE SECURITIES AND EXCHANGE ACT.

THE EVIDENCE AFFIRMATIVELY SHOWS THAT THE STOCK TRANSACTION INVOLVED IN COUNTS XIV, XV AND XVI ARE WITHIN THE EXEMPTIONS FROM THE ACT, UNDER SECTION 77D THEREOF.

VII.

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY.

VIII.

THE DISTRICT COURT ERRED IN SUSTAINING THE DEMURRER TO THE PLEA IN ABATEMENT AND IN GRANTING A MOTION TO STRIKE THE SAME.

IX.

THE COURT ERRED IN FAILING TO SUBMIT ISSUES PRESENTED BY THE PLEA IN ABATEMENT TO A TRIAL BY JURY.

I.

The Indictment Fails to State an Offense Against the Laws of the United States. The Demurrer to These Counts Should Have Been Sustained.

Here the indictment in counts 14, 15 and 16 alleges that the appellant caused a certificate of stock of a California corporation to be mailed from one place in Los Angeles county to another place in Los Angeles. The indictment therefore on its face alleges facts that show no crime was committed. For the act itself SPECIFICALLY eliminates any mailing of stock of a corporation organized in a state and doing business within that state.

The indictment contains an allegation of conclusion of the pleader that the stock is not exempt, but it contains no statement of fact to support such conclusion, and the only facts alleged are such as show that no offense was committed.

In *United States v. Cruickshank,* 92 U. S. 542, 23 L. Ed. 588, 593, 594, and in *U. S. v. El Paso & N. E. R. Co.,* 178 F. 846, it is stated that an indictment must allege facts—facts from which the court may determine if the indictment charges a crime, facts from which an accused may prepare his defense and plead once in jeopardy. Here the presumption of innocence clothes the defendant. The facts set up in the indictment of themselves must show if true that a crime has been committed, or the defendant is entitled to his discharge.

II.

The District Court Erred in Holding That Where There Has Been Full and Fair Disclosure of the Character of the Securities Involved to the Officials of the State by a State Corporation, Doing Its Principal Business in That State, and the Only Transactions Involved in the Particular Convictions Were Within a County of the State, That the Securities and Exchange Act Is Applicable to This Case.

In *People v. Schidtz,* 7 Cal. App. 330, at 374, it is said:

> "It is an elementary principle of criminal law that the indictment must show that a crime has been committed. 'In no case can the indictment be aided by imagination or presumption. The presumptions are all in favor of innocence, and if the facts stated may or may not constitute a crime, the presumption is that no crime is charged.' (People v. Terrill, 127 Cal. 100 (59 Pac. 836).)"

All the facts alleged in the indictment are lawful.

Electric Bond & Share Co. v. S. E. C., 92 F. (2d) 580, 586;

Peo. v. Terrill, 127 Cal. 100;

Peo. v. Schidtz, 7 Cal. App. 330, 374;

Peo. v. Davenport, 21 Cal. App. (2d) 292.

We will argue this point further as to whether the mailing of a certificate from one place in a county to another, if it occurred, is a violation of the act, under the points below.

The main object of the Securities Act of 1933, as expressed in its heading, is "to provide full and fair dis-

closure of the character of the securities sold." It is not to protect the mails from fraud, as is the purpose of the Mail Fraud statute, but to protect the public by full and fair disclosure of the character of the securities sold.

Where this is accomplished within the state, as required by the Securities Act of California, and where there has been full and fair disclosure of the character of the securities sold, it surely was not the intent of Congress to punish and jail a person for use of the mails within a state by a corporation within that state, whereas if some other instrumentality were used there would be no punishment whatever.

An examination of the heading of the act indicates that it was intended to protect *interstate and foreign commerce and the use of the mails in interstate and foreign commerce where there had been no full and fair disclosure of the character of the securities sold in interstate and foreign commerce and through the mails.*

The importance of the title and preamble to tell of the purpose and object of the act is shown by the following cases:

Neece v. Northern Pacific R. R. Co., 211 Fed. 254;
In re Firthman, 118 Cal. App. 332;
Blumenthal v. Larson, 79 Cal. App. 726;
Bettencourt v. Sheely, 157 Cal. 698;
Sharon v. Sharon, 75 Cal. 16.

In the case at bar there had been full and fair disclosure, not once, but three times. There had been three different permits issued by the Corporation Commissioner of the State of California, and no question is raised but that

there had been full and fair disclosure of the character of the securities sold.

It has been repeatedly said by the Supreme Court of the United States that the Government will not interfere in matters where the state itself takes care of them, matters that are purely intrastate, or largely so. California is quasi-sovereign. (*Lisenba v. California,* 86 L. Ed. 179, 190.) In the case of *Milk Wagon Drivers Union v. Meadomoor Dairies,* 85 L. Ed. 837, the United States Supreme Court again emphasized the importance of states being left alone in matters that are of concern within the state. We have in this case the finding of the Corporation Commissioner of California that there has been full and fair disclosure of Consolidated Mines of California. See, also:

Hysler v. Florida, 86 L. Ed. 584.

The act of Congress in connection with securities was intended as a policing measure, that is to say, it was within the police power of Congress in its supervision over securities in interstate commerce. It was not intended as a policing measure over the mails, because if it were it would throw every local security within the policing power of Congress, and certainly this was never intended. Nor does the headnote of the act show such intent.

The policing power in this case is certainly no greater than that which is necessary. Where, within a state, a corporation and its officials have complied with every requirement of full and fair disclosure, the police power of Congress was not intended to apply to purely local transactions in which the mails might have incidently been used, especially by an individual who was neither an officer nor employee of the company.

In *Electric Bond and Share Co. v. Securities and Exchange Comm.,* 92 Fed. (2d) 580, at 586, it is said:

> "Congress has long exercised, and the courts have sustained, the federal power to prevent the facilities of interstate commerce and the mails from being used to accomplish ends inimical to the general welfare. This legislation is concerned with the power of the federal government to control in the public interest the flow of commerce and intercourse through these channels; but not to the extent that the government may impose a collateral obligation upon the person responsible for the flow. The latter question depends upon the particular relationship of the obligation to, and its influence upon, that flow. Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160; Board of Trade etc. v. Olsen, 262 U. S. 1, 43 S. Ct. 470, 67 L. Ed. 839; Stafford v. Wallace, 258 U. S. 495, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229; United States v. Ferger, 250 U. S. 199, 39 S. Ct. 445, 63 L. Ed. 936. Such questions may arise when the validity of other portions of the Act is presented to a court, but are not here involved in the consideration of the registration provisions because these sections are directly confined to certain regulations of the use of the channels of interstate commerce and the use of the mail facilities. No holding company need register unless it makes specified uses of the mails and instrumentalities of interstate commerce. *A holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails* and the channels of interstate commerce." (Italics ours.)

It will thus be seen that the purpose of the Securities and Exchange Act is to regulate the flow of securities in interstate commerce and the use of the mail facilities in

that respect, and that a company whose business is predominantly intrastate need not register even though it makes use of the mails.

While the *Electric Bond and Share Company* case involved that of a holding company, which enactment was an amendment to the original Securities Act of 1933, it is held in the Circuit Court opinion that "a holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce."

We have repeated this language, which we have heretofore quoted, because it fits the particular case at bar.

The three transactions of which appellant was convicted were not only merely intrastate but they were transactions from one point in the City of Los Angeles to another point in the City of Los Angeles of personally owned stock. The business of the corporation itself was and is predominantly intrastate. The corporation is a California corporation and all of its transactions, with the exception of involving isolated Oregon committeemen, were California transactions.

The evidence as to these few transactions was introduced into the case by the Government primarily to prosecute and convict the defendant with relation to other counts in the indictment of which he was acquitted. The testimony of those witnesses cannot therefore properly be considered at all with relation to the three counts of which he has been convicted. It has long been construed by the courts that each count in an indictment must be consid-

ered as though it was a separate indictment, because obviously, if the evidence had been introduced on that count in a separate trial it would have no value in this trial.

Dunn v. United States, 284 U. S. 390.

Returning now to the power of Congress in passing the Securities and Exchange Act, the Congress of the United States must be deemed to have acted with no desire to invade the reservations of the Tenth Amendment to the Constitution of the United States, which reserves to the states all powers not specifically granted to Congress.

It was not the intention of the enactors of this law to provide police regulations relating to the internal trade and affairs of a state nor with small corporations within the state nor with individual transactions. "This," said the United States Supreme Court in *United States v. Dewitt,* 9 Wall. 41, 19 L. Ed. 593, 594, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." (See *Keller v. United States,* 213 U. S. 138, 144-146, 53 L. Ed. 737, 740; *Cooley, Constitutional Limitations,* 7th Ed., p. 11.)

Our federal government is one of enumerated powers. (*McCulloch v. Md.,* 4 Wheat. 316, 4 L. Ed. 579.) A statute must be construed according to its natural and reasonable effect. (*Collins v. N. H.,* 171 U. S. 30, 43 L. Ed. 60, 62.) The powers not expressly delegated to the

national government are reserved to the states. (*Lane County v. Ore.*, 7 Wall. 71, 19 L. Ed. 101.)

An examination of the statute shows that it was the intent of Congress that the principal object of the statute should be to control interstate and foreign commerce and the use of the mails generally in that respect. The statute itself defines interstate commerce in section 2, subdivision 7, as follows:

> "(7) The term 'interstate commerce' means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia."

Sections 3 and 4 of the statute list a large number of exemptions from the act. Section 3, subdivision 11, provides as follows:

> "(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within or if a corporation, incorporated by and doing business within, such State or Territory."

The act also gives full powers to the S. E. C. to exempt other securities not necessary to come under the act in the public interest.

The act itself, therefore, shows the intent of the Congress to exempt from its provisions, and they are so exempted, "any security which is part of an issue sold only to persons resident within a single state where the issuer of such security is a person resident and doing business within, or has a corporation in and incorporated by and doing business within such state," and subdivision (b) gives the Commission specific authority to exempt securities "if it is not necessary in the public interest to require a registration statement."

Surely the nature of the particular transactions of which this appellant was convicted, and for which he was sentenced to six months in jail on each count, although the company had fully and fairly made public all the facts regarding the corporation within the state, is not of such a nature as was intended to come within the scope of the Securities and Exchange Act, and was exempt within the provisions of the act relating to intrastate transactions, and personally owned transactions.

III.

Where Stock Is Personally Owned and It Is Not Charged That There Is Anything Fraudulent or Improper in the Sale or Dealings, an Act of Congress, if Construed to Apply to the Sale of Such Personally Owned Stock, Would Offend the Fifth Amendment to the Constitution of the United States, Holding That No Person Can Be Deprived of Property Without Due Process of Law.

The evidence in this case shows that Frank S. Tyler received his principal stock in exchange for the mines and certain advances that he made for the corporation. It therefore became personally owned stock. One certificate came to him through a different transaction. This stock came from J. R. McKiver, which is reflected in certificate No. 666 issued to McKiver for his mining properties. He owned a mine and it was a part of the consideration in the permit of the Corporation Commissioner that McKiver receive 10,000 shares of stock in payment for his mine.

McKiver then reissued 5,000 shares of the 10,000 shares by certificate No. 680 to Frank S. Tyler. Certificate No. 680 was reissued, 4,000 shares going to Tyler by certificate No. 716. No. 716 was divided and from that certificate, certificate No. 732 was issued to Dr. Homer J. and Mrs. Arnold [R. 272-273, 343].

As such personally owned stock Tyler was entitled to transfer it freely and it was not within the regulatory power or purpose of the Securities and Exchange Act. If it were construed to be within the power, purpose and scope of the act, as thus construed and applied, the act would be unconstitutional as offending the Fifth Amendment, which gives the right to a person to use and dispose of his personal property as he sees fit and places no restriction upon such personally owned property. If it did

so, it would be unconstitutional. (*People v. Pace,* 73 Cal. App. 548; *People v. Davenport,* 21 Cal. App. (2d) 292; *Billings v. Hall,* 7 Cal. 1, 6; *Ex parte Quarg,* 149 Cal. 79; *Cooley's Statutory Rights,* p. 68.)

This Court has inferentially held this to be the law of this case in the case of *Consolidated Mines of Calif. v. Securities and Exchange Comm.,* 79 F. (2d) 704, 707. That case challenged the right of the Securities and Exchange Commission to order subpoenaed and brought in the books of the company, due to the various transactions which were under investigation. It was asserted that the stock did not come within the review of the Securities and Exchange Commission, because it was personally owned stock. This Court held that it was the right of the Commission to examine into the stock to see if it was personally owned stock, and that if it was personally owned stock, it did not come within the prohibition of the Federal Securities Act. This being the law of the case the trial court was bound to follow it, but did not.

But if it be assumed that the Congress in passing the act had the Fifth Amendment in mind, and that it passed the act in the light of that amendment, then it must be assumed that Congress did not intend to restrict the sale and distribution of personally owned stock, which would be a limitation upon an individual's right to do business under the Constitution, and would impair the freedom of that person's contract guaranteed by the Constitution. If the act is thus construed and applied, then no violation of the statute could have taken place in the mailing of three personally owned stock certificates from one point in Los Angeles to another point in Los Angeles.

People v. Pace, 73 Cal. App. 548;
People v. Davenport, 21 Cal. App. (2d) 292.

IV.

Where a Defendant Is Tried by a Jury and One of the Vital Questions to Be Determined Is Whether He Owned the Stock Personally, and if He Did, That It Would Be Exempt Under the Law, the Trial Court Invades the Province of the Jury When It Instructs Them That It Is Immaterial Whether the Stock Is Personally Owned or Not.

The trial court instructed the jury as follows:

> "The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned."

The act itself, as we construe it, exempts personally owned stock. (Section 4, subd. 1.) It exempts "transactions by any person other than an issuer, underwriter or dealer," and further says, "The term 'issuer' means every person who issues or proposes to issue any security." (Sec. 2, subd. 4.)

The stock (with the exceptions above mentioned to which this discussion has no application) which had been issued to Tyler was issued to him in exchange for property and became his personally owned stock. He was not an issuer within the meaning of the act. Even if the trial court were to view Tyler as an issuer, it was for the jury to determine whether under the act he was or was not an issuer. The jury became the sole determiner of the facts in the case. (Article III, sections 2 and 6, and the Sixth and Seventh Amendments to the United States Constitution, which preserve inviolate the right of trial by jury.)

It was the jury's duty and the defendant's right to have the jury determine whether the stock was personally owned, and if so, whether this placed the stock within the exemption of this provision of the statute. The Court's instruction with reference thereto was therefore erroneous.

V.

The Securities and Exchange Act Shows ~~an~~ No Intent to Provide a Different Regulation for the Use of the Mails Than for Interstate and Foreign Commerce.

If the Securities and Exchange Act is given the constructions which would sustain this judgment, then it means that a different rule would apply to the use of the mails from one place in Los Angeles to another in Los Angeles than to interstate and foreign commerce. Thus a local corporation which might send stock from its office in a city to another point in that city would be in violation of the act, because the mails were used, whereas another corporation which used local messenger service or an express company, or other agency in the state, would not be in violation of the act. One would have to register because it dropped a letter in the mails, and another would not have to register because a different agency was used. Such a holding would put a strained construction on the act and would place unnecessary burden upon the Securities and Exchange Commission and upon local corporations using the mails. It would also be detrimental to the Post Office Department, for it would cause a lack of use of the mails in innocent business transactions—and might very well be helpful to telegraph and express companies which do not come under the ban of this particular statute unless the transaction is in interstate commerce.

That this was not the purpose of the act is shown in *Electric Bond and Share Co. v. S. E. C.*, 92 F. (2d) 580.

VI.

The Evidence Is Insufficient to Support the Charges Set Forth in Counts 14, 15 and 16. It Affirmatively Establishes Exemptions Under Section 77d of the Act of 1933, as to the Transactions Charged in These Counts.

Section 77d reads in part:

> "The provisions of Section 77e shall not apply to any of the following transactions:
>
> "(1) Transactions by any person *other than an issuer, underwriter, or dealer;* transactions by an issuer not involving any public offering;" (Italics added.)

The certificates issued to Dr. and Mrs. Arnold and the Goodriches were exempt from the requirement of Section 77e, the violation of which section counts 14, 15 and 16 charge.

The only evidence which the record contains to show the origin of the stock certificates issued to Dr. Arnold, Regina Woodruff and the Goodriches is the testimony of Louis R. Jacobson, the certified public accountant and Government witness. He was called by the Government and undoubtedly was qualified both as an expert and by reason of his knowledge of the business affairs of the corporations involved.

Jacobson was employed by Shaw and he set up the accounting system and built up the records of the financial transactions which form the basis of the case [R. 272-273]. Jacobson testified at great length and in detail, among other things, as to amounts advanced by Shaw and Frank S. Tyler.

It appears that there had been three permits issued by the California Corporation Commission to the Consoli-

dated Mines. The last one allowed the issuance of 10,000 shares of stock to J. R. McKiver, which is reflected in certificate No. 666 issued to J. R. McKiver and is thus an original issue; 5,000 shares of the 10,000 were reissued to Tyler by certificate No. 680; No. 680 was reissued, 4,000 shares going back to Tyler by certificate No. 716. No. 716 was divided and from it certificate No. 732 was issued to the Arnolds [R. 343].

Government witness Jacobson also traced the certificates issued to Regina Woodruff and the Goodriches back to the same certificate, to-wit, No. 716, and he said this certificate represented private stock as distinguished from company-owned treasury stock [R. 343, 344]. We quote the witness' exact language, as follows:

> "The Woodruff certificate No. 741 is for 30 shares of stock issued to Regina Woodruff on May 13, 1937, and that was transferred from Frank S. Tyler certificate dated August 26, 1937, on certificate No. 716 originally for 4,000 shares. August 26, 1937—that was beyond my time.
>
> "Goodrich, 740, 18 shares, that is the same transaction. It goes back to certificate 716, and then back, and comes from the private stock. . . ."

That McKiver gave valuable and legally sufficient consideration for the 10,000 shares represented by certificate No. 666 is shown by the corporation's stock books and the certificate of the Corporation Commission [R. 344]. This certificate, therefore, goes back to permit No. 3 of the Corporation Commission issued to Consolidated Mines of California out of the stock authorized to be issued to Mr. Tyler and persons in partnership with him [p. 282].

THE GOVERNMENT HAVING PRODUCED HIM IS BOUND BY HIS TESTIMONY.

The trial judge told the jury:

> "Where the permit authorizes the giving of stock for something, the Government cannot go behind and say that is too much money . . . It is a matter of law I will give you later, the amount of stock Mr. Tyler was given by the corporation. There is no restriction as to who he could sell it to."

The statement has especial application to the McKiver stock and to the same stock after its transfer to Tyler and his ownership thereof.

Other portions of the testimony of the accountant, Jacobson, are to the same effect and consistently establish that all of Tyler's stock was his own privately owned stock, and Section 77d expressly exempts the owner of securities from the registration requirements of the Security Act.

It is also so held in *Rudnick v. Bischoff,* 17 N. Y. S. (2d) 575.

THERE IS NO PROOF THAT APPELLANT CAUSED ANY MAILING.

There is no evidence in the case that the appellant Shaw, neither an officer nor employee, caused to be mailed the certificates in question.

As to count 14, Dr. Arnold testified that he had talked to Shaw about the mine. He said:

> "The first I had heard of it was when Mr. Morgan (chairman of the Monolith stockholders' committee [R. 399]), got my name, evidently from the committee list, and called about this transfer that some

of them were making, but I didn't talk with him any further. Then the next time I saw Mr. Shaw I spoke to him about it. He said he was keeping me in mind but he was waiting until things got a little further along before he said anything to me about it.

"Mr. Morgan called me on the telephone. The time I discussed this with Mr. Shaw was some weeks or a few months prior to the month of December, 1936. I think that was when I got my stock." [R. 473.]

Count 15 relates to the transaction of Regina Woodruff of 802 North Vermont, Los Angeles, California. Her testimony was as follows:

"Q. Now, this certificate which is photographed in the indictment, No. 741, for 30 shares is dated the 13th of May, 1937, and did that come to you through the United States mails, Miss Woodruff?

A. It did."

Prior to receiving this I had had a transaction with the Consolidated Mines of California. I talked with someone who was there and said he was Mr. Shaw. That was by telephone. I called up the office and asked for Mr. Tyler. Most of the letters which I had received had been from Mr. Tyler, and I had called once or twice before and I asked for information and had talked with Mr. Tyler. I asked for Mr. Tyler and was told that he was no longer in the office, but that I might talk with Mr. Shaw, and that was the first time that I even knew that Mr. Shaw was connected with the thing at all. I hadn't had any information in regard to the Consolidated Mines for some time, and I wanted to know what was being done, and why, and just what progress was being made, and he

assured me that everything was fine and that he was working without salary and he was hoping that the thing would be paying very, very soon because he wanted to be drawing a salary, and that he was quite sure that it would be paying us dividends and we would get our money back within a reasonable length of time; and he wanted me to convert my Midwestern stock into the Consolidated Mines, and he offered me—I had 30 shares of Midwestern, Monolith Midwestern,—and he offered me 60 shares for it. I think that is the substance of it.

I had a certificate for 30 shares of Monolith Midwestern stock, and Mr. Shaw's offer was to give me 60 shares of this Consolidated Mines for that. I sent it in and I received through the mails this certificate and I immediately called the office again and at that time I asked for Mr. Shaw and said that I had been told that I would receive 60 shares and had received only 30, and he said, "Well, that was a very serious mistake," and he would see that I got the other 30, which I did.

The Eva M. Goodrich transaction is the basis of the charge made in count 16.

All that we know about how that transaction was conducted appears in the record, pages 265 to 269, inclusive.

The name of William J. Shaw is not therein mentioned.

Upon what theory the jury or the Court surmised that Shaw had anything to do with the transportation of the stock certificate to Eva M. Goodrich is difficult to even guess. It would have been impossible to do more than surmise that he took some part in the matter because there is no evidence on the subject.

As to the other two counts it appears that Mr. Shaw arranged the terms of the transactions, but the record

does not supply any competent proof or any fact which tends to establish who mailed the certificates or caused either to be mailed.

Regina Woodruff testified that she had received letters from Mr. Tyler and she called on the telephone and asked for him, but was told that he was no longer there, but that she might talk with Mr. Shaw. The witness stated that she had not heard about Consolidated Mines for some time and said, "I wanted to know what was being done, and why, and just what progress was being made"; she told the jury of a conversation about the mine and said "he" offered 30 shares of Consolidated stock for her 30 shares of Midwestern, Monolith.

It may be assumed that she accepted the proposition because she said she sent her stock in and received back through the mail a certificate for 30 shares. Thereupon she called the office, asked for Mr. Shaw, said she was to receive 60 shares and had only received 30 and was told that a serious mistake had been made and that the speaker would see that she got the other 30 shares, and thereafter, so the witness said, she "got another 30." [R. pp. 119-121.]

This witness did not testify that the person to whom she talked on the telephone was Mr. Shaw; she did not say she had ever seen Mr. Shaw, either before this telephonic transaction, during it or afterward; she did not claim to know Mr. Shaw's voice or assert that the voice which she heard over the phone on the two occasions mentioned by her was the voice of this appellant. She neither attempted to identify the voice or the person who spoke to her.

Regina Woodruff merely related the facts as she knew them and did not attempt to draw any conclusions therefrom.

Appellant contends that the facts so related do not legally permit of the inference that the person with whom the witness conversed was the defendant William J. Shaw. Apparently the witness was not asked whether she knew the defendant Shaw's voice. She was not asked by any form of question to identify the voice which she heard over the telephone. Had any question calling for her conclusion in that regard been asked it would have been objectionable in that no foundation whatever had been laid.

It seems obvious that the same lack of foundation exists and prohibits the inference that it was William J. Shaw who talked to Regina Woodruff on both of the occasions concerning which she testified.

It is of the essence of the offense to show that Shaw caused each of the stocks to be mailed, and this must be shown by competent evidence.

Shaw was neither an officer nor a director of the Consolidated Mines. In *Freeman v. United States*, 20 Fed. (2d) 748, 750, the Court said:

> "The basic element of the offense is the placing of a letter in the United States mail for the purpose of executing such scheme. That is what makes it a federal offense. It is defined in the statute, must be alleged in the indictment, and must be proved. How? The Government says that it may be proved by the presumption arising from the postmark, 22 Corpus Juris 99, or, under the general rule that a postmark is *prima facie* evidence, that the envelope had been mailed, 21 R. C. L. 763; United States v.

Noelke (C. C.), 1 F. 426. That, concededly, is the rule in civil cases; but it leaves unanswered the question—vital in criminal cases—who mailed it? The statute imputes the crime to 'whoever . . . shall . . . place or cause to be placed any letter in the mails, . . .' and the indictment here charged that the three defendants did that thing. That charge, we hold, must be proved by evidence. The evidence need not be direct; that is, it need not be that the defendants were seen mailing the letter; it may be circumstantial, that is, evidence of the acts or doings, or business custom of the defendants, from which their act of mailing or their act which caused the letter to be mailed may reasonably and lawfully be inferred. . . .

"No case has been called to our attention and none has been discovered by our independent research where conviction has been sustained when there is no evidence, direct or circumstantial, that the accused mailed the letter. In the case at bar there is ample evidence of the receipt of the three letters through the mail, but the only circumstance that connects Freeman with mailing them, or any of them, is that the enclosures bore his signature and that a month or more before the letters were received Freeman had, in one instance, been asked for a statement of his company. The date of the request is too remote from the date of the receipt of the letter to connect the two. Moreover, we think the fact that Freeman signed the statement is not proof that he mailed it. As to Rosin and Paskow, there is no evidence connecting them with mailing the statement other than it was written on their company's stationery and enclosed in the company's envelope.

> "On this issue, we are constrained to reverse the judgment as to the three defendants and direct that they be given a new trial in harmony with this opinion."

In the case at bar the evidence is much weaker than in the *Freeman* case. Just as in the *Freeman* case there is ample evidence of the receipt of the three letters through the mail, so in the case there is ample evidence of the receipt of the three stock certificates through the mail. In the *Freeman* case, Freeman's name was signed on the enclosures in the letter. The Court there held that even though Freeman signed the statements, that was not proof that he mailed them. In the case at bar there is no evidence to show that Shaw signed any letter or certificate or that he mailed the stock certificates or directed anyone to mail them to Dr. Arnold, Mrs. Woodruff or Mrs. Goodrich, or that it was the custom of the company for Shaw to direct or cause the certificates to be mailed. In fact Mrs. Woodruff testified that most of her transactions were done with Tyler, the secretary, and that she generally communicated with him.

Dr. Arnold was Shaw's personal physician, and most of Arnold's conversations were with Shaw, but there is no showing that Shaw caused the stock certificates to be mailed to Dr. Arnold. In fact there is no reason why Shaw would not have personally taken the certificate to Dr. Arnold, who was treating him all the time (Shaw being a diabetic who was under physicians' care) and the mailing of the certificate must have been caused by some other person.

Mrs. Woodruff did not know Mr. Shaw, had never talked to him, and had no knowledge of who mailed the certificate to her.

Mrs. Goodrich received a stock certificate signed by Frank S. Tyler. The evidence does not show who sent it, or how it came to her, or that she ever knew or heard of Shaw.

Under this state of the record it is respectfully submitted that the evidence is entirely insufficient to show that the appellant Shaw caused the certificates to be mailed.

In the *Freeman* case the letter showed that the enclosures bore Freeman's signature. In the present case none of the letters bore Shaw's signature and the stock certificates were all signed by Frank S. Tyler. The fair inference from this is that Shaw did not cause the certificates to be mailed, under the *Freeman* case it would not be an inference that even the signer of the enclosures had caused the certificates to be mailed. To attempt to connect Shaw with the mailing of the letters it would be necessary for this Court to build an inference upon an inference. It would have to be inferred, although there is no evidence to support it, that Tyler or someone else caused someone to mail the letters, and it would then have to be inferred that Shaw caused Tyler to cause someone to mail the letters. There is no evidence to support such inference upon inference, nor is it legally permissible. (*Brady v. United States*, 24 Fed. 399, 403.)

In *Rosenberg v. United States*, 120 Fed. (2d) 935, 936, it is held:

> "The crime charged in the indictment has its genesis in the scheme to defraud, but the very gist and crux of the offense is the use of the mails in furtherance of the scheme. It is the use of the mails for that purpose which vests a federal court with jurisdiction of the offense. Direct proof that the

letter or other matter described in the indictment in a case of this kind was transmitted through the mails is not necessary. That fact, like many others, may be established by circumstantial evidence. Freeman v. United States, 3 Cir., 20 F. 2d 748; Brady v. United States, 8 Cir., 24 F. 2d 399, certorari denied, 278 U. S. 603, 49 S. Ct. 10, 73 L. Ed. 531; United States v. Baker, 2 Cir., 50 F. 2d 122; Cohen v. United States, 3 Cir., 50 F. 2d 819; Berliner v. United States, 3 Cir., 41 F. 2d 221; Davis v. United States, 3 Cir., 63 F. 2d 545; Mackett v. United States, 7 Cir., 90 F. 2d 462; Whealton v. United States, 3 Cir., 113 F. 2d 710. But an inference of fact which is essential to the establishment of the offense cannot be rested upon another inference. Conviction cannot be predicated upon one inference pyramided upon another. Presumption cannot be superimposed upon presumption and thus reach the ultimate conclusion of guilt. United States v. Ross, 92 U. S. 281, 23 L. Ed. 707; Vernon v. United States, 8 Cir., 146 F. 121; Brady v. United States, *supra*; Mackett v. United States, *supra*."

Plain error is shown on the face of the record.

While no exception was noted to the evidence as to counts 14, 15 and 16, an examination of the testimony of the witnesses relating to those transactions shows the insufficiency of the evidence on its face, and plain error, of which this Court will take notice.

Hannon v. United States, 9 F. (2d) 933;
McAffee v. United States, 105 F. (2d) 21;
Benson v. United States, 112 F. (2d) 422;
Troutman v. United States, 100 F. (2d) 628;
Lewis v. United States, 92 F. (2d) 952.

THE STOCKS WERE NOT A TRANSACTION BY ANY ISSUER, UNDERWRITER OR DEALER. THERE WAS NO PUBLIC OFFERING.

The District Court erred in holding that the transactions in each of the counts were not exempt under Section 77(d) of the act (sec. 4(1)), which provides exemptions for "transactions by any person other than an issuer, underwriter or dealer; transactions by an issuer not involving any public offering."

The three stock certificates were not transactions by any issuer, underwriter or dealer. They had been sold to McKiver, who in turn had sold the same to Tyler, and Tyler had split up the certificates as to each certificate involved in counts 14, 15 and 16. Under no construction, therefore, could the stock sent to Dr. Arnold and Mrs. Arnold, Regina Woodruff and Mr. and Mrs. Goodrich be considered as "a public offering."

In *Dunn v. United States,* 284 U. S. 390, 70 L. Ed. 356, it is held that each count in an indictment is regarded as if it was a separate indictment, and where separate evidence is presented as to each count that evidence alone can be considered.

NOR WAS THERE A PUBLIC OFFERING.

In *Securities and Exchange Comm. v. Sunbeam Gold Mining Co.,* 95 F. (2d) 699, it was held that where a company was issuing securities pursuant to a plan which had been agreed to between it and another company, and letters were sent out to various stockholders regarding a proposed merger, and where the transaction was solely between the merged companies and the stockholders, there was no public offering.

VIII.

The Trial Court Erred in Instructing the Jury.

The defendant Shaw excepted to one instruction given to the jury which especially pertained to counts 14, 15 and 16 [R. p. 573]. This instruction reads:

> "The Section of the Act which the defendant Shaw is charged with violating is Section 5(a)(2), which reads as follows:
>
> " 'Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> " '(2) To carry or cause to be carried through the mails or in interstate commerce, by any means of instruments of transportation, any such security for the purpose of sale or for delivery after sale.'
>
> "In determining whether or not there has been a willful violation of this Section, as alleged in Counts 14, 15 and 16, you must determine whether or not there was a registration statement in effect as to the shares of stock of Consolidated Mines of California, whether or not such securities were actually sold to the witnesses Goodrich, Arnold and Woodruff, or any of them, and you must further determine whether or not the defendant Shaw caused any of such securities of the Consolidated Mines of California to be carried through the mails for sale or for delivery after sale.
>
> "The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant. *The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned.*" (Italics ours.)

Undoubtedly Section 77e covers these transactions, but by Section 77d they are expressly exempted from the provisions of the first named section. Section 77a reads:

> "The provisions of Section 77e shall not apply to any of the following transactions:
>
> "(1) Transactions by any person other than an issuer, underwriter or dealer."

In each of the transactions now under consideration Frank S. Tyler was the seller of his own stock and the buyer was neither an "issuer, underwriter nor dealer." It surely cannot be said that one who owns corporate stock and sells it can be regarded as an underwriter or dealer in disposing of such stock.

It appears to have been the theory of the Government that in Tyler's transactions involved in counts 14, 15 and 16 he was an underwriter. This contention is based upon Section 77b, par. 11 of the Security Act and the definition there given of the word "underwriter." This paragraph reads:

> "(11) The term 'underwriter' means any person who has purchased from an issuer with a view to, or sells for an insurer in connection with, the distribution of any security or participates or has a direct or participates or has a participation in the direct or indirect participation in any such undertaking or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term 'issuer' shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."

But even this unusual definition of the "underwriter" does not fit the case of Frank S. Tyler and his relation to certificate No. 716 from which the three certificates involved in counts 14, 15 and 16 were carved. Tyler did not purchase certificate No. 680 from the "issuer."

It will be remembered that the original issue for which the corporation received value and which was authorized by the Corporation Commissioner of California, was certificate No. 666 issued to J. R. McKiver. This was McKiver's personal stock and the certificate represented 10,000 shares.

Thereafter Frank S. Tyler purchased 5,000 shares of this 10,000 shares from McKiver, which 5,000 shares were issued to Tyler by certificate No. 680; Tyler then divided this certificate and received back 4,000 shares represented by certificate No. 716.

As far as certificate No. 680 is concerned it was not only Tyler's personal stock but *he did not purchase it from the issuer;* nor did he sell it for the issuer.

Without making an analysis of paragraph 11 and showing that it does not, by any provision, encompass Tyler's transaction with respect to certificate No. 680 or portions thereof, suffice it to say that there is no evidence which tends to show that Tyler controlled the corporation issuer or that it controlled him in dealing with this stock, or which would otherwise bring Tyler within the purview of Section 2, paragraph 11.

It follows, therefore, that the instruction to which exception was taken was erroneous.

It is not the law that the fact that the stock sold was or was not personally owned stock "is immaterial" as far as the Federal Securities Act is concerned, because, although that single fact may not in all cases be con-

trolling, it is relevant and material in determining whether the transaction involved a sale by the "issuer, underwriter or dealer." This results from the fact that the general rule, under Sections 77d and 2 paragraph 11, leaves the owner of stock, who did not purchase it from the actual issuer, exempt from the requirements of Section 77e.

Without some competent evidence that the appellant was that person there is no proof whatever to in any way connect him with the Regina Woodruff transaction or the offense alleged in count 15 and there is certainly not one iota of evidence to show that appellant had anything to do with the *mailing* to her of the certificate.

Count 16 is the Dr. and Mrs. Arnold count. If this count were divorced from all the others (and legally it is a separate charge), and if the story of Dr. Arnold in which the transaction is described be read and considered alone, it would not make business sense; that is to say, the transaction was not business-like; rather, it was a friendly matter in which Shaw, the business man, sought to satisfy the request of his professional non-business friend and mildly encouraged the latter's expressed desire.

According to Dr. Arnold it was Morgan who first mentioned the mine to him. After that and after Arnold had sold Midwest stock for $480, on one of the occasions when Dr. Arnold saw Shaw as a patient the doctor spoke to Shaw about putting that money into the Consolidated Mines [R. p. 122]. Shaw told him it was not a big mine but ought to turn out a reasonable profit [R. p. 124]. Dr. Arnold proposed that Shaw take 250 shares and pay $420 in cash and $80 in treatments to Shaw for the stock, which Shaw accepted [pp. 122-124].

Dr. Arnold did not tell the Court to whom he paid $420. He rendered professional services to Shaw, but

the record shows that the stock which he received came from a certificate owned by Tyler, to-wit, certificate No. 716. Certain facts which the record does not show would be enlightening, for example, in determining whether the stock which the doctor received was Tyler's or Shaw's.

But appellant maintains that this is not material; that such evidence as the record contains reflects Shaw acting without compensation from anyone and in the capacity of a friend to the owner of the stock, his brother-in-law, and also as a friend to the purchaser, his physician, arranging a deal which both buyer and seller desired.

Shaw was neither issuer, underwriter nor dealer.

Otherwise stated the Tyler stock which is involved in counts 14, 15 and 16 is exempt from registration with the Commission as provided in Section 77e(1), because as to it Tyler qualified for exemption under Section 77d as personal owner and not the issuer, underwriter or dealer, (2) and he is not within the definition of an underwriter as that term is defined in Section 77b, paragraph 11, because he, Tyler, did not purchase this particular stock from the issuer, but obtained it from McKiver who personally owned it.

Thus it is demonstrated that the fact of personal ownership by the seller is one essential element in Tyler's exemption from the purview of Section 77e, the other fact being that his predecessor in interest owned the same shares personally.

This Court has inferentially held in *Consolidated Mines v. Security and Exchange Comm.*, 97 F. (2d) 704, that if the stock in question is personally owned stock it would not come within the prohibitions or sanctions of the Securities and Exchange Act and therefore established the law of the case. The Court said:

"They say, however, that the sales were made by appellant Tyler of his personally owned stock independently of the company. The Commission had substantial evidence to the contrary. This soliciting sales or encouraging purchases were written on the stationery of the corporation, and in some instances the signers designated themselves as corporate officers. The proceeds of the securities sold were in part loaned or contributed to the corporation and were used to keep the properties in operation, thereby enabling more stock sales to be effected. *Certainly the facts in possession of the Commission justified an investigation to determine whether the sales were in truth the individual transactions of Tyler or were made on behalf or at the behest of the corporation.*" (Italics ours.)

This Court therefore implicitly holds that if the stock was the personally owned stock of Tyler it would not come within the sanctions of the act.

This Court held that if the transactions were individual transactions of the secretary of the corporation that it would not be necessary to investigate the matter, and inferentially held that the Commission would not have any right to investigate the matter, which raised a substantial issue of fact. The same issue was presented to the jury in the trial. The Court decided the fact and did not leave it to the jury.

The decision of this Court in *Consolidated Mines v. Security and Exchange Comm.*, 97 F. 704, was handed down as the law of the case and should have been followed by the trial court in submitting this very issue to the jury. That it did not do so, we respectfully submit, requires a reversal of the judgment.

IX.

The District Court Erred in Sustaining the Demurrer to the Plea in Abatement and in Holding That the Appellant Was Not Immune When He Appeared Before the Commission in Response to a Subpoena and Testified as a Witness on Behalf of the Government With Reference to the "Matter of Consolidated Mines of California."

Section 22(c) of the Securities Act of 1933 as amended, 15 U. S. C. A. Sec. 77v(c), provides as follows:

> "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury in so testifying."

The appellant was called to testify as a witness in the matter of the affairs of the corporation. Under the act he could not refuse to attend or refuse to testify. He did so testify regarding all matters and things about which he was asked. The company produced, under the com-

pulsion of a subpoena, the books and records of the corporation under a Commission order appellant testified with relation to all the matters and things about which he was asked with relation to Consolidated Mines. The giving of this testimony granted him immunity.

Counselman v. Hitchcock, 142 U. S. 547;

Brown v. Walker, 161 U. S. 819, 40 L. Ed. 819;

United States v. Goldman, 28 Fed. (2d) 424;

United States v. Armour & Co., 142 Fed. Rep. 808;

Hale v. Henkel, 26 Sup. Ct. 370;

In re Critchlow, 11 Cal. (2d) 751;

Ex parte Cohen, 104 Cal. 524;

Ex parte Clark, 103 Cal. 352;

In re Williams, 127 Cal. App. 424;

People v. Schwartz, 78 Cal. App. 561;

State v. Quarles, 13 Ark. 307, quoted in 142 U. S. 567, 12 Sup. Ct. 199, 35 L. Ed. 1110;

People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 851;

People v. Butler, 201 Ill. 236, 248, 66 N. E. 349;

In so far as the Securities and Exchange Act attempts to require a person to claim his privilege after he is called and required to testify, it is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States, because the immunity must be as broad as the constitutional guaranty.

Counselman v. Hitchcock, 142 U. S. 547;

In *United States v. Goldman,* 28 Fed. (2d) 424, at 434, 435, the Court said:

> "We come, then, to the last objection urged against the pleas in bar. These defendants, it is asserted by the government, waived their immunity by failing, before the grand jury, to claim their constitutional privileges and refuse to testify. I am unable to see just why a person should be expected to claim a privilege which the law bestows upon him. There is nothing in the language of section 30 which justifies this claim. Nor do I think that the law stakes the liberty of the citizen upon the due performance of some piece of ceremonial mummery. Just how should these two defendants have made their claim? By refusing to obey the mandate of the subpoena? Such refusal would subject them to fine and imprisonment. By refusing to testify once they were within the grand jury room. Such refusal might conceivably lead to an instruction from the court that they would be immune from prosecution. But that is what the statute had already provided, and so they would need no such assurance. On what ground then, could they refuse to testify? None is suggested. And, if the law says that they may not refuse, are we to understand that that same law required that they should refuse?
>
> "It is indeed true that upon this subject also there is a conflict of opinion. In the case of United States v. Skinner (D. C.), 218 F. 870, Judge Grubb of Georgia, sitting in the Southern district of New York, wrote an elaborate opinion in support of the thesis that, even under such a statute, the right to refuse to testify must be asserted before immunity follows. The argument would have been more convincing if the learned judge had pointed out upon

what principle a non-existent right can ever be asserted. But in United States v. Pardue (D. C.), 294 F. 543, Judge Hutcheson vigorously expressed his dissent from Judge Grubb's conclusion, and on page 546 said:

"'Judge Grubb, in the Skinner Case, stands alone in the position which he there takes. While his opinion presents a splendid argument against the wisdom of the immunity statutes as they now are, and a good suggestion to the legislative authorities for an amendment of them, it presents, in my opinion, no judicial ground for refusing to apply the statute as written. It by judicial interpretation writes into a statute in derogation of a constitutional right a limitation not therein contained, and which the ordinary mind, to which the statute is addressed, could not have supposed was contained in it. It to an extent follows the Draconian principle of writing the law in characters so fine that no one can read it, and thereby putting the government in a better position to take the unwary ones into its net. It magnifies the fault of the defendant, while it minimizes the bad faith of the government. It puts the seal of condemnation upon the offense against the general laws of which the defendant is charged, but it approves double dealing and evasion on the part of the government in the matter of a man's constitutional protection, which right reason and sound discrimination cannot, in my opinion, sustain."

Judge A. N. Hand, in the case of United States v. Lay Fish Co. (D. C.), 13 F. (2d) 136, expressed himself as in accord with Judge Grubb in the Skinner Case; but in United States v. Moore, *supra*, Judge Bean held that, under section 30, title 2, of the National Prohibition Act, immunity of witnesses tes-

tifying before the grand jury is not waived by their failure to claim the privilege and refused to testify, and on page 594 of 15 F. (2d) said:

" 'There are, I know, some decisions of District Courts to the contrary; but, in view of the construction given the statute by the Supreme Court, it seems to me clear that the court is forced to the conclusion that the pleas in bar are good. It is said that defendants are not entitled to immunity, because they did not, when called as witnesses, claim their privilege and refuse to testify. That would have been a useless act on their part, because they were compelled to testify whether they wanted to or not. Such was the ruling in the Brown Case. It cannot be said that they waived their privilege when they appeared in obedience to subpoena and testified for the government. They had no alternative but to comply with the subpoena. Having done so, the government is not in position now to charge Moore or Robinson with a conspiracy to violate the Prohibition Act.'

"Such was the conclusion of Judge Neterer in United States v. Ward (D. C.), 295 F. 576. Indeed the Moore Case is the only one which deals specifically with section 30, title 2, of the National Prohibition Act. A well-reasoned and persuasive opinion by the New York Court of Appeals in construing a similar statute will be found in People v. Sharp, 107 N. Y. 427, 14 N. E. 319, 1 Am. St. Rep. 821, and, indeed, in none of the cases above cited will there be found an attempt to meet the powerful presentation by Judge Danforth in the Sharp Case. Had there been any doubt in my own mind, I would have found it impossible to resist the logic of that opinion as found on page 443 *et seq.* of 107 N. Y. (14 N. E. 319)."

The District Court erred in denying to the appellant a trial by jury on the issue of whether he was entitled to immunity. The Court in its opinion stated that the defendant took the stand and gave testimony after he was informed concerning his constitutional privilege against self-incrimination. The Court said:

> "These facts are not denied. If they were, an issue of fact might be created as to which the defendant would be entitled to a jury trial. Jones v. United States, 9th Circuit (1910), 179 F. 584.

There is no need for this."

However, there was an issue of fact raised as to whether, under the circumstances of the case, even though Shaw appeared before the committee and testified, he did so voluntarily or under the compulsion of a request made to him to appear, and what the intent of the parties was.

In the case of *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110, it was said that no statute which leaves the party, or witness, subject to prosecution after he answers the incriminating questions, can have the effect of supplanting the privilege of the Fifth Amendment; that to be valid the immunity must be *absolute* against any future prosecution for the offense to which the question relates, and that a statute merely prohibiting the introduction in evidence, for the use in any manner or discovery or evidence obtained from a party or witness affords no protection against that use of compelled testimony which consists of gaining therefrom a knowledge of the details of the crime, and of the sources of information which may supply other means of convicting the

witness or party. The Court holds that the statute must be as broad as the constitutional guaranty. It said:

> "We are clearly of the opinion that no statute which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the revised statute does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the questions relate."

The instant act, therefore, is *conditional* and not absolute. The condition is that the witness must claim the privilege, and unless he does so the statute is not effective.

If the statute is valid there is no privilege to claim. The mere testifying itself grants the immunity under the statute. The interpretation of immunity has been before the United States Supreme Court on several occasions, and each and all of them have sustained the leading case of *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110. They have been repeatedly unheld. (See *Interstate Commerce Comm. v. Baird,* 48 L. Ed. 860; *Arndstein v. McCarthy,* 65 L. Ed. 138; *United States v. Goldman,* 28 F. (2d) 424.)

A statute must grant absolute and unconditional immunity. (*In re O'Shea,* 166 F. 180.)

Any statute which merely grants conditional immunity, such as this statute, is a delusion and a snare, and places

conditions beyond the Fifth Amendment to the Constitution of the United States.

The *Counselman* case holds, and the constitutional guaranty provides, that a person may not even be called and compelled to be a witness against himself. The statute in question provides that the witness must appear and testify. The *Counselman* case holds that any statute which so provides must grant absolute immunity. The condition to claim the privilege destroys the constitutional validity of the statute.

As said in *Olmstead v. United States,* 277 U. S. 944, 72 L. Ed. 438, 473:

> "When the 4th and 5th Amendments were adopted, 'the form that evil had theretofore taken' had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected. if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of 'the sanctities of a man's home and the privacies of life' was provided in the 4th and 5th Amendments, by specific language. Boyd v. United States, 116 U. S. 616, 630, 29 L. ed. 746, 751, 6 Sup. Ct. Rep. 524. But 'time works changes, brings into existence new conditions and purposes.' Subtler and more far-reaching means of inviding privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."

In *Entick v. Carrington,* 19 How. St. Tr. 1030, it is said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other."

Mr. Justice Fields in *In re Pacific Railroad Comm.*, 32 F. 241, 250, said:

> "Of all the rights of the citizen few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right all others would lose half their value."

X.

Appellant Entitled to Trial by Jury on Issue of Facts.

The demurrer to the plea in abatement should have been overruled and the case set down for trial. The plea in abatement pointed out that the Securities and Exchange Commission appointed Milton V. Freeman examiner, to require and compel the production of books, papers, contracts, agreements and other documents before the said Commission at their hearing. It further pointed out that the appellant was requested to appear at such hearing as a witness on behalf of the Government concerning the affairs and conduct then under investigation by the Commission of the Consolidated Mines of California, a corporation. That corporation, which was then under investigation, did not appear because no subpoena had been issued against them, and when a subpoena was issued against them, the corporation failed to produce its books until ordered and compelled to do so by an order of the Court. It was duly appealed to the Ninth Circuit Court of Appeals, which affirmed the order of the District Court. The appellant was neither an officer nor an employee of the company, but the Government subpoenaed him as the Government's witness [R. 72].

The statute says that "no person shall be excused from attending and testifying." The statute shows that he could be brought to the hearing by some other method than by a subpoena, and the record shows that he was requested to appear. This shows in the affidavit of Milton V. Freeman. It certainly would be an odd situation if one who appears at the request of an officer not to be immune unless he disobeys the request of the officer and fails to appear when requested to do so. Having appeared and testified

pursuant to that request he was granted immunity under the statute.

But the Government in its demurrer to the plea in abatement and its motion to strike the plea, stated that the plea in abatement did not set up facts sufficient to show that the defendant was compelled to testify or produce evidence, documentary or otherwise, concerning any transaction, matter or thing, which is the basis of this indictment or otherwise.

In support thereof was the affidavit of Milton V. Freeman, the examiner, which in itself showed that appellant Shaw fully testified regarding the matters for which he was subsequently prosecuted. This affidavit showed that the examiner thought he was not granting immunity to the petitioner by reason of this testimony. However, it was not for the examiner to decide whether immunity was granted or not under the factual situation that was raised by this case, nor in fact was it the duty of the trial judge to decide it by sustaining the demurrer to the plea in abatement. It raised an issue of fact which should have required the trial court to overrule this demurrer and set the matter down for trial, requiring the Government to answer and join an issue of fact.

In *Sherwin v. United States,* 268 U. S. 368, 69 L. Ed. 1001, Sherwin and Schwarz filed a plea in bar of immunity under section 9 of the Federal Trade Commission Act on the ground that information which they gave resulted in their subsequent prosecution. In that case there was a replication; issue was joined; a trial was had upon the plea, and under instructions of the Court *the jury* found against the defendants upon their plea of immunity.

It is respectfully submitted that the same procedure ought to have been followed here in so far as the Court

overruling the demurrer and the motion to strike the plea. In respect to the granting of the motion to strike the plea in abatement the trial court erred.

The trial court says in its opinion:

> "He took the stand and gave testimony. These facts are not denied. If they were, an issue of fact might be created as to which the defendant would be entitled to a jury trial. Jones v. United States, 9 Cir., 1910, 179 F. 584. There is no need for this." [R. 100.]

The trial court overlooks the fact in its opinion that prior to giving his testimony the officers of the corporation had been compelled, not only by subpoena but by District Court and Circuit Court order, to produce the books and records of the corporation, and also that the appellant was requested to appear, and he did appear, in response to the examiner's request. Under the terms of the statute, this appearance at the request of the examiner was compulsory. The examiner was duly authorized to require the appearance of the petitioner and was regularly appointed for that purpose. His request was a mandate of law, just as much as is the request of a police officer to a man to accompany him to the jail. It may be that the man won't run away and won't refuse to come along; but the request is mandatory and compulsory. We know by the language of the section itself that "no person shall be excused from attending and testifying *or* from producing books," etc., *or* "in obedience to the subpoena of the Commission, or any member thereof or any officer designated by it, on the ground that the testimony or evidence, documentary or otherwise, required of him, may intend to incriminate him or subject him to a penalty or forfeiture; . . ."

It will be noted that the section requires and states that no person shall be excused "from attending and from testifying." If the official designated as the proper officer for the Commission says "come to my office and testify," the witness so called has no other alternative.

The question then arises as to what was the intent of the Commission in calling Shaw, and what was the intent of Shaw when he testified. He was entitled to a determination of these facts by a jury.

This very issue is raised by the affidavit of Milton V. Freeman which says, "Affiant did not intend to grant said defendant Shaw immunity from prosecution. Affiant did not then believe and does not believe that immunity from prosecution was granted to the defendant."

If Freeman did not intend to grant immunity appellant was entitled to a trial by jury on that intent, as the plea in abatement set up the allegation that the appellant was called as a witness *on behalf of the Government* concerning the affairs and conduct then under investigation by the Commission of the Consolidated Mines of California, a corporation.

It was equally important both from the standpoint of the Government and from the standpoint of the defense to determine the understanding and belief under which the witness testified. Furthermore, the statement of the examiner to Shaw that "At this time I must advise you that you may refuse to answer any question that I may ask you if the answer may tend to incriminate you or subject you to any penalty or forfeiture" was not followed by any request by the said examiner to Shaw asking Shaw whether he waived his privilege, and the record shows that there was no waiver of privilege.

In criminal cases an express waiver is needed. (*Jones v. United States* (9th Cir.), 179 F. 584; *Stanton v. United States,* 281 U. S. 276; *Irvin v. Zerbst,* 97 F. (2d) 257; *Spann v. Zerbst,* 99 F. (2d) 336.)

The jury was also entitled to have passed upon the matter as to whether there was any express waiver. There being none, the immunity of the statute flowed. The last statement is based upon the premise that there was a privilege to waive, which is not conceded.

For under the case of *Counselman v. Hitchcock,* quoted above, the mere compliance with the statute when one is requested to testify is sufficient to grant statutory immunity and there is no privilege to waive.

Conclusion.

It is respectfully submitted that under the objects and purposes of this act and the exemptions which the Congress of the United States has applied to it, that no offense against the laws of the United States was committed by the appellant; that he is exempt from the purposes and scope of the act and its declared provisions, and that the Court erred in its instructions to the jury with reference to personally owned stock, which is exempt under the law of this case and under the act; that the Court further erred in depriving the appellant of a trial by jury on his plea in abatement and in granting the motion to strike the plea.

As stated in the memorandum of the Securities and Exchange Commission to the United States Supreme Court:

> "The fundamental purpose of the Securities Act of 1933 . . . is to protect the investing public. The act furnishes one form of protection by insisting that

> 'every issue of new securities to be sold in interstate commerce shall be accompanied by full publicity and information' to the end that 'no essentially important element attending the issue shall be concealed from the buying public.' Message of the President to the Congress, March 29, 1933." (Footnote, 85 L. Ed. 505.)

The Consolidated Mines of California appeared three times before the Corporation Commissioner of California. Its acts were accompanied by full publicity and information, and nothing was concealed from the public. The particular stocks involved in counts 14, 15 and 16 were not a new security, nor were they sold in interstate commerce, but were sent from one address to another address in the County of Los Angeles. The appellant was neither an officer, a director nor an employee of the company. He did not cause the stock to be mailed. The persons who received the stocks had no complaint about its fairness, nor did they complain that there had been any concealment or that there had not been a full and fair disclosure of the same.

Yet the appellant faces six months in jail.

It is respectfully submitted that the judgments should be reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

No. 9916.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SUPPLEMENT TO APPELLANT'S OPENING BRIEF.

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Parker & Baird Company, Law Printers, Los Angeles

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SUPPLEMENT TO APPELLANT'S OPENING BRIEF.

Statement of Jurisdiction on Appeal.

In compliance with Rule 20, appellant herewith presents his statement of jurisdiction on appeal.

A.

The statutory provisions which sustain jurisdiction are section 128(a) Judicial Code as amended, 28 U. S. C. A. section 225 (43 Stat. L. 936 and 347), and Title 15, section 77v (C. 38 Title 1, section 22, 48 Stat. 86; C. 804, 49 Stat. 1921).

B.

The indictment in this case charges as follows:

(Caption) Viol. Section 5(a) (2), Securities Act of 1933, as amended (Title 15, United States Code, Section

77q(a) (2), Section 37, Criminal Code (Title 18, United States Code, Section 88), Section 215, Criminal Code (Title 18, United States Code, Section 338). (Note: This heading seems inapplicable to Counts 14, 15 and 16.)

In the District Court of the United States in and for the Southern District of California, Central Division. [R. 2.]

Fourteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore, on or about December 21, 1936, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, knowingly, unlawfully, wilfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certificate, No. 732, for 250 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Dr. Homer J. Arnold and Florence R. Arnold, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to-wit:

Said defendants on or about December 21, 1936, caused to be delivered by the Post Office establishment of the

United States according to the directions thereon, a post-paid envelope addressed to Dr. Homer J. and Florence R. Arnold, 345 South Norton, Los Angeles, California, enclosing said security, which said security was of the following tenor, to-wit:

"Number 732 Shares ** 250 **

Incorporated under the laws of the
State of California

CONSOLIDATED MINES OF
CALIFORNIA

Capital Stock 1,000,000 Shares
No Par Value

Fully Paid, Fully Voting and Non-assessable

This Certifies that Homer J. Arnold and Florence R. Arnold, Joint Tenants, with full rights of Survivorship is the registered holder of Two Hundred Fifty Shares, being the shares represented hereby, of Consolidated Mines of California hereinafter designated 'the Corporation,' transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the seal of the Corporation and the signatures of its duly authorized officers, this 14th day of December, A. D. 1936.

H. L. WIKOFF,
President.

FRANK S. TYLER,
Secretary.

For value received.....hereby sell, assign and transfer unto..... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ....., Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated.....

.....

In the presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever."

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Fifteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore on or about June 3, 1937, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, wilfully, knowingly, unlawfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certi-

ficate number 741, for 30 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to Regina Woodruff, no registration statement being in effect as to such security, and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to-wit:

(Insert after the word "to-wit" at end of first paragraph on page 5.)

Errata.

Said defendants on or about June 3, 1937 caused to be delivered by the Post Office establishment of the United States according to the directions thereon, a post-paid envelope addressed to Mrs. Regina Woodruff, 802 North Vermont, Los Angeles, California, enclosing said security, which said security was of the tenor following, to-wit:

[illegible] designated the Corporation, transferable on the share register of the corporation upon surrender of the certificate properly endorsed or assigned. By the acceptance of this certificate the holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the seal of the Corporation and the signatures of its duly authorized officers, this 13th day of May, A. D. 1937.

H. L. WIKOFF,
President.

FRANK S. TYLER,
Secretary.

For value received ..... hereby sell, assign and transfer unto..... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated.....

.....

In the presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever."

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Sixteenth Count.

And the grand jurors aforesaid, upon their oath aforesaid, do further present and show that the defendants William Jackson Shaw, also known as W. J. Shaw, and Frank S. Tyler, heretofore on or about June 8, 1937, at Los Angeles, County of Los Angeles, state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, wilfully, knowingly, unlawfully and feloniously did cause to be delivered by the United States mails a certain security, to-wit: a certi-

ficate, number 742, for 18 shares of the capital stock of Consolidated Mines of California, a corporation, for the purpose of sale and for delivery after sale of said security to J. C. and E. M. Goodrich, no registration statement being in effect as to such security and no exemption from registration being available, and said delivery by the United States mails was in the manner following, to-wit:

Said defendants on or about June 8, 1937, caused to be delivered by the Post Office Establishment of the United States according to the directions thereon, a postpaid envelope addressed to Mr. J. C. and E. M. Goodrich, 4532 South Wilton Street, Los Angeles, California, enclosing said security, which said security was of the tenor following, to-wit:

"Number 742 Shares 18

Incorporated under the laws of the
State of California

CONSOLIDATED MINES OF
CALIFORNIA

Capital Stock 1,000,000 Shares
No Par Value

Fully Paid, Fully Voting and Non-assessable

This Certifies that J. C. Goodrich and E. M. Goodrich, Joint Tenants with full right of survivorship is the registered holder of Eighteen Shares, being the shares represented hereby, of Consolidated Mines of California hereinafter designated 'the Corporation,' transferable on the share register of the corporation upon surrender of this certificate properly endorsed or assigned. By the acceptance of this certificate the

holder hereof assents to and agrees to be bound by all of the provisions of the Articles of Incorporation and all amendments thereto.

Witness, the Seal of the Corporation and the signatures of its duly authorized officers, this 8th day of June, A. D. 1937.

H. L. WIKOFF,
President.

FRANK S. TYLER,
Secretary.

For value received ..... hereby sell, assign and transfer unto..... ..... shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... Attorney to transfer the said stock on the books of the within named corporation with full power of substitution in the premises.

Dated.....

.....

In the presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular, without alteration or enlargement or any change whatever."

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [R. 56-64.]

C.

The defendant Shaw entered a plea in abatement [R. 70] on the ground that he was called as a witness for the Government in an investigation by the Securities and Exchange Commission and was thereafter immune from prosecution by reason of said facts [R. 70]. A demurrer to the plea in abatement on the grounds that the plea in abatement failed to state facts sufficient to constitute a valid plea in abatement for the reason that it does not appear from the said plea that the defendant was compelled to testify or that he claimed the privilege, was sustained, and a motion to strike the plea in abatement [R. 91, 92] was granted [R. 97-103].

Defendant's demurrer to the indictment on the grounds that it failed to state alleged facts sufficient to constitute an offense under the laws of the United States and failed to inform the accused of the nature and cause of the accusation against him with certainty, and upon other grounds therein set forth, was presented to the Court [R. 77] on April 8, 1940, and overruled by the Court and exception noted as to each ground therein expressed [R. 96].

The defendant entered a plea of not guilty on June 17, 1940 [R. 103, 104], the cause came on for trial on June 17, 1941 in the District Court of the United States, Southern District of California, Central Division, the Honorable Leon R. Yankwich, Judge Presiding. The Court asked the defendant if he was able to proceed and the defendant stated that "he is not able to hire counsel because he is a pauper." The Court thereupon appointed C. C. Montgomery, Esq. as attorney for the defendant and the case proceeded forthwith [R. 105].

The verdict of the jury acquitted the defendant of counts 1 to 13 and not involved in this appeal, and convicted him of counts 14, 15 and 16 as above set forth on July 9, 1941.

The motion for a new trial came on for hearing on July 11, 1941. The Court overruled the motion for a new trial and exception was noted [R. 111].

The Court on September 15, 1941, sentenced the defendant to six months imprisonment upon each of the counts, 14, 15 and 16, to run concurrently [R. 112, 113].

On the same day and date notice of appeal was duly and regularly filed by the appellant to the Circuit Court of Appeals [R. 113]; within the time allowed by law a bill of exceptions was duly and regularly signed and approved by the Honorable Leon R. Yankwich [R. 575], together with assignment of errors [R. 115].

D.

Nature of Case and Rulings Below.

The appellant is sentenced to six months imprisonment on a charge of causing a letter to be mailed from one address in Los Angeles County to another address within the county, which contained a stock certificate of a California Corporation duly and regularly licensed under the laws of the State of California to do business within the state, and whose permit and dealings were a matter of publicity and public record in the State of California and had been approved as to its fairness and honesty to transact business within the state.

The first issue presented in the case is whether an indictment charging a defendant with merely causing a let-

ter to be mailed which contained stock of a state corporation doing business within the state, from one place within a county in the state to another place in the same county, states a public offense, under the Securities and Exchange Act regulating sale of securities in interstate commerce and the use of the mails, and whether a demurrer to such an indictment should not have been sustained.

The appellant in this case was neither an officer, nor a director, nor an employee of the Consolidated Mines of California. It is not charged that he mailed the stock certificates, but only that he caused the certificates to be mailed to three persons within the city and county where he lived. The evidence in the case shows not only that the corporation involved was a California corporation, operating a mine 21 miles east of Jackson, Calaveras County, California, but, also, that the stock certificates involved in this case were the personally owned stock certificates of Frank S. Tyler. The dealings were fair and honest and attended with full publicity of the Company's stock in California.

The appellant was called as a witness to testify before the Securities and Exchange Commission on behalf of the Government with reference to the Consolidated Mines of California. Thereafter the indictment charged him with having caused the three certificates to be mailed. A plea in abatement was filed to the indictment on the ground that the appellant was immune from testifying by reason of his testimony before the Securities and Exchange Commission and the provisions of Section 22(c) of the Securities Act of 1933 as amended, 15 U. S. C. A., Section 77v(c).

This appeal challenges the constitutionality of the Securities and Exchange Act with reference to personally owned stock as construed by the District Court, as being in violation of the Fifth Amendment to the Constitution of the United States, and the constitutionality of the statute as construed and applied in this case.

This appeal also raises the following questions:

I.

(a) Where a corporation is duly and regularly organized under the laws of a state, and full and fair disclosure has been made of all of the facts regarding the corporation to the state officials, and it is shown in the permit, to the satisfaction of the state authorities, that the transaction is fair, equitable and just to the investors, the said state authority being one authorized by law to investigate and pass upon the question and to receive full and fair disclosure and make it available to the public any time, is it a violation of the Securities Act of 1933 to use the mails in sending a letter from one place in Los Angeles to another place in Los Angeles without filing a registration statement with the Federal Securities and Exchange commission?

(b) Where the purpose of the Securities and Exchange Act is "to provide full and fair disclosure of the character of the securities sold in *interstate and foreign commerce and through the mails* and to prevent fraud in the sale thereof," and for other purposes, "is a prosecution of an individual who was neither an officer, director nor employee of a company for causing the mails to be used in intrastate commerce by sending stock of a state corporation duly and regularly authorized under the laws of

the state, which has made a full and fair disclosure of the character of the securities sold within that state to the duly constituted authorities, authorized by the Federal Securities and Exchange Act?

(c) Is such an interpretation of the Act holding that it is a violation of the Securities and Exchange Act, an improper interpretation, since such interpretation has no reasonable relationship to the object sought by the Act?

II.

Where stock is personally owned and it is not charged that there is anything fraudulent or improper in the sale or dealings, does an act of Congress, if construed to apply to the sale of such personally owned stock, offend the Fifth Amendment to the Constitution of the United States holding that no person can be deprived of property without due process of law?

Does such statute impair the freedom of contract guaranteed by the Constitution?

Is such an act as construed and applied unconstitutional?

III.

Where a defendant is tried by a jury and one of the vital questions is whether he owned the stock personally, and if he did, that it would be exempt under the law, does the Court invade the province of the jury by instructing them that it is immaterial whether the stock is personally owned or not?

IV.

Where the stock is part of an issue generally sold only to persons resident within a single state or territory where the issuer of such security is a person resident and

doing business within, or is a corporation incorporated by and doing business within such state or territory, is the sale of such security exempt under the act itself where the transactions which the accused is alleged to have had were all within the state and city, and where the only evidence of any other transactions are regarding isolated cases of persons who had been members of a stockholders' committee group which had had its stock in deposit within the state itself and where the transactions were finally consummated within the state?

V.

Where the only stock involved in the alleged violation was personally owned stock transferred from one owner to another and sold by the second owner, is such stock within the exemption of Section 3, Subd. 10?

VI.

Where this Court has previously held implicitly in a decision involving this company that personally owned stock is exempt is it the law of the case which the District Court is bound to follow?

VII.

Where the Court takes away from the jury the right to determine whether stock is personally owned and therefore exempt from the Securities and Exchange Act, is it an invasion of the province of the jury and reversible error?

VIII.

Where a plea in abatement is submitted to the Court and an issue of fact is raised as to whether immunity was granted by reason of the appearance by request of a per-

son before the Securities and Exchange Commission, should the demurrer to the plea in abatement be overruled and the issue submitted for trial before a jury?

IX.

Where a person is neither an officer nor an employee of a company is the evidence sufficient to show that he caused a stock certificate to be mailed from one place in Los Angeles to another place in Los Angeles solely by reason of the fact that the certificates were mailed?

X.

Is the burden of proof upon the Government to show that the stock was not one of the exempt classifications, or can it shift that burden of proof to the defense, and is the burden of proof upon the Government to prove beyond a reasonable doubt that the defendant acted without innocent intent?

E.

Cases and Sections Believed to Sustain Jurisdiction.

Title 15, Section 77v, U. S. C. A.;

Title 28, Sections 225 and 347;

Electric Bond & Share Co. v. Securities & Exchange Commission, 92 F. (2d) 580;

United States v. American Bell Telephone Co., 159 U. S. 548, 40 L. Ed. 255;

United States v. Sanges, 144 U. S. 310, 36 L. Ed. 450;

Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 48 L. Ed. 496.

Morris Lavine,

Attorney for Appellant.

No. 9916

IN THE

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FOR THE NINTH CIRCUIT

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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Statement of Facts.

The statement of facts set forth in appellant's opening brief (pp. 1-5) is incomplete and is so insufficient as to be misleading to this Court. Appellee, therefore, sets forth hereinafter its counter-statement of facts, as disclosed by the record.

In 1931, the "Monolith Committee" was formed to represent the stockholders of Monolith Portland Cement Company and Monolith Portland Midwest Company. Appellant dominated and controlled such Committee and served as its chief investigator. [R. 135, 136, 137, 466].

Shareholders of the Monolith Companies were solicited by the Committee under the direction of appellant to advance 50¢ for each share of their holdings to raise funds to prosecute a civil action for damages, which action resulted favorably to the shareholders and as a result of which a settlement of the judgment was made in the

amount of $225,000 [R. 469, 472]. Appellant was the underwriter of the original Monolith issues of securities, underwriting such issues in the amount of one-and-one-half million dollars under the name of his company, W. J. Shaw & Company [R. 466]. The stock of the Monolith Companies had value, which value immediately and substantially increased after the judgment secured in the civil litigation [R. 159].

Thereafter, and following the settlement of the civil action, appellant and Frank S. Tyler prepared or caused to be prepared what was known as the Frank S. Tyler Partnership Agreement. This agreement provided, among other things, that a mining partnership should be formed and Tyler should convey to or hold in trust for the partnership, options to purchase certain mining properties known as the McKisson, Grand Prize, and Mineral Lode [R. 482, 142, 143, 277, 281]. Tyler was indicted herein with appellant and pleaded *nolo contendere* as to the sixteen counts of the indictment [R. 110].

After the preparation of the Tyler Partnership Agreement, shareholders of Monolith Companies were solicited to exchange their Monolith holdings, or to turn in their shares at an agreed valuation, and were later to receive stock in a mining company to be formed. The shareholders of the Monolith Companies would sign the Tyler Agreement and deliver their shares, and sometimes cash, to the solicitors [R. 141, 142, 143]. The Tyler Agreement was dated February 6, 1934 [R. 482], and Consolidated Mines of California, a California corporation, was incorporated on September 19, 1934 [R. 483].

Appellant completely dominated and controlled the activities of the Monolith Committee, the Tyler Partnership and Consolidated Mines of California. He employed solicitors

to contact shareholders, received Monolith stock and the money collected by the solicitors, used his office as headquarters for the Monolith Committee, the Tyler Partnership and Consolidated Mines of California [R. 136, 137, 485]. The deposit of Monolith stock was first solicited for the Tyler Partnership, and later in exchange for the stock of Consolidated Mines of California [R. 137, 140, 141, 147]. Individuals employed by appellant further contacted Monolith shareholders to buy the stock of Consolidated Mines of California, and these individuals called upon at least twenty-five hundred holders of Monolith stock [R. 141, 184]. The solicitation to switch holders of the Monolith stock into the stock of Consolidated Mines of California was not confined to the State of California, but solicitations for exchanges and sales were made to residents of the State of Oregon and within the State of Oregon [R. 128, 162, 187, 262, 264, 269].

As appears from the entire record, the United States mails were extensively used in connection with the solicitation to exchange Monolith stock for the stock of Consolidated Mines of California, to sell the stock of Consolidated Mines of California, and to deliver such stock certificates to purchasers. Form or circular letters were directed to the prospects and were prepared by appellant and his associates or under the direction of appellant [R. 335]. Stenographers chosen and employed by appellant, as a regular part of their duties and in the regular course of business, prepared correspondence dictated by appellant and others in his office directed to prospects and to shareholders of Consolidated Mines of California [R. 336, 337, 355], assisted in the preparation of form or circular letters [R. 337], forwarded certificates for the stock of Consolidated Mines of California by registered mail [R. 362].

and otherwise performed their duties under direction of appellant [R. 361].

After the incorporation of Consolidated Mines of California by attorneys employed by appellant [R. 484] and after a permit had been secured from the Corporation Commissioner of the State of California for the issuance of certain stock of the corporation, stock authorized by such permit eventually was purchased by the investors named in Counts 14, 15 and 16 of the indictment.

The record discloses that appellant dominated Frank S. Tyler. By a so-called profit agreement dated July 1, 1935, between appellant and Tyler [R. 483], appellant received an assignment from Tyler of an 80 per cent interest in any and all net income to be realized from the consideration received by Tyler from the partnership agreement and from the net capital stock Tyler received as his 40 per cent interest in Consolidated Mines of California [R. 544, 545]. The agreement further provided that stock of Consolidated Mines of California to be issued to Tyler was to stand on the books of that company in his name, but that Tyler would authorize the transfer of said stock to appellant or his nominees [R. 545]. The income tax returns of Tyler for the years 1935 and 1936 indicate the receipt of salaries, wages and share of profits from the sale of stock as paid Tyler by appellant [R. 325, 326]. Appellant was authorized to and did sign checks upon the bank account of Tyler [R. 294], but Tyler was not authorized to sign checks upon the bank account of appellant [R. 349].

The rental for offices used by Consolidated Mines of California was paid by appellant individually [R. 305]. Appellant exercised full control in the securing of a bond

and lease upon the mining properties of Grand Prize and Mineral Lode, entering into such bond and lease as agent for Consolidated Mines of California [R. 204, 205, 207]. Appellant further entered into agreements for the securing of mining rights upon other properties and signed the agreements to secure such rights on behalf of Consolidated Mines of California [R. 210, 211, 212]. After leases for such mining properties had been made by appellant, appellant decided which property should be worked [R. 234]. Difficulties in connection with the attempted operations were detailed to and discussed with appellant [R. 238-242] and appellant directed the shipping of the small amount of ore which was taken from the operations of properties worked by Consolidated Mines of California [R. 245].

The decision to form Consolidated Mines of California was made by appellant and he formulated the entire procedure to form such corporation and solicit funds to "get into production and start making good money within ninety days" [R. 400, 401].

Financial records kept by appellant (in the name of Tyler) disclose that in connection with the purchases, sales and trades of the Monolith stock and the stock of Consolidated Mines of California for the years 1934, 1935, 1936 and 1937, appellant withdrew the sum of $137,-043.61 and during the same period deposited a total of $88,197.24, or an excess of withdrawals over deposits in the sum of $48,846.37 [R. 392]. During the same period, the net profits from the sales of Monolith stock, Consolidated Mines stock sold for cash, and cash taken in on the Tyler Agreement were, according to the books of appellant, $72,802.17 [R. 394].

No registration statement was at any time filed with the Securities and Exchange Commission for the stock of Consolidated Mines of California [R. 268, 544].

Appellant was specifically advised by his attorney in June, 1936, that the stock of Consolidated Mines of California was not exempt from registration under the provisions of the Securities Act of 1933 [R. 525-528, 537-538].

The records of appellant disclose that during the period 1934-1937, expenditures at the mines which were attempted to be operated by Consolidated Mines of California totaled $48,611.09 [R. 392]. This sum represented part of the receipts from the sales of the stock of Consolidated Mines of California and of the sales of Monolith stocks secured in exchange for the stock of Consolidated Mines of California [R. 392]. Appellant testified that Consolidated Mines of California was indebted to him personally in the sum of $37,000.00 [R. 551].

The transactions of the investor witness Homer J. Arnold named in Count 14 of the indictment were had with appellant. As a result of discussions with appellant, this investor witness agreed to and did purchase 250 shares of the stock of Consolidated Mines of California. He thereafter received his stock certificate for 250 shares through the United States mails [R. 384, 473-475].

The investor witness Regina Woodruff named in Count 15 of the indictment testified that years prior to the transactions here involved, she had purchased Monolith stocks through the office of appellant. She called the office of Consolidated Mines of California and requested, by telephone, to speak with Mr. Tyler. She was informed that Mr. Tyler was not present but that she could speak with Mr. Shaw. She held a conversation with the man iden-

tified as Mr. Shaw, and as a result thereof, agreed to exchange her Monolith stocks for that of Consolidated Mines of California. Following this telephone conversation, she received through the United States mails certificate No. 741 for 30 shares of the stock of Consolidated Mines of California [R. 350-352].

The investor witness Eva M. Goodrich named in Count 16 of the indictment testified that she was the owner of stock in Monolith Portland Midwest Company and that she traded such stock for shares of Consolidated Mines of California. The record is silent regarding the person with whom she dealt. She testified that she received her certificate for the 18 shares of Consolidated Mines of California stock through the United States mails [R. 265, 383].

During the year 1936, Securities and Exchange Commission, an agency of the Government of the United States, having reasonable grounds to believe that the provisions of Sections 5 and 17 of the Securities Act of 1933 were being violated in connection with the sale of securities of Consolidated Mines of California, a corporation, directed that an investigation be instituted and thereupon designated one Milton V. Freeman as an officer to conduct such investigation, and empowered Freeman to administer oaths and affirmations, to subpoena witnesses and to take evidence.

On July 17, 1936, Freeman called appellant to appear before him and appellant appeared voluntarily and without subpoena. Appellant was duly sworn by Freeman, pursuant to the powers granted Freeman by Securities and Exchange Commission. After ascertaining the name and address of the defendant, Freeman advised appellant con-

cerning his constitutional privilege against self-incrimination. Appellant thereafter, on July 20, 1936, and September 2, 1936, reappeared before Freeman and was examined concerning his connection with the affairs of Consolidated Mines of California and the Stockholders Protective Committee of the Monolith Portland Cement Company. Appellant was at all times during the course of said examinations represented by counsel, and stenographic transcripts of his testimony were taken. At no time during the course of the examinations did appellant claim his privilege against self-incrimination, although he was advised concerning his rights when first sworn and was reminded of those rights upon each subsequent day upon which his testimony was taken. Every effort was made by Freeman to make clear to the defendant the existence of his constitutional privilege against self-incrimination [R. 93, 94, 95].

The appearance of appellant before Freeman was at a time approximately two-and-one-half years prior to the return of the indictment of appellant and approximately two years prior to the decision of this Court in the case of *Consolidated Mines of California, et al., v. Securities and Exchange Commission,* 97 Fed. (2d) 704, decided June 30, 1938.

Appellant's promotional efforts met the inevitable end. The mine at which operations were attempted closed down in December, 1937, and until the time of appellant's trial, only assessment work and cleaning out of the tunnels was performed [R. 522]. Receipts from ore sales for the period 1934-1937 totaled only $958.71 [R. 392]. The record is silent as to any dividends paid and as to any value whatsoever for the stock of Consolidated Mines of California.

Statement of the Case.

An indictment containing seventeen counts was returned against appellant in the United States District Court for the Southern District of California, Central Division, on December 13, 1939. Counts 1 to 13, inclusive, charged appellant and Frank S. Tyler with violations of the mail fraud statute (Title 18, U. S. C., Section 338); Counts 14 to 16, inclusive, charged appellant and Tyler with violations of Section 5(a)(2) of the Securities Act of 1933 (Title 15, U. S. C., Section 77e(a)(2)—*note:* the caption of the indictment erroneously designated Section 5(a)(2) of the Securities Act of 1933 as Title 15, U. S. C., Section 77q(a)(2)); Count 17 of the indictment charged violations of the conspiracy statute (Title 18, U. S. C., Section 88).

Thereafter, appellant attacked the indictment by demurrer and also filed a plea in abatement thereto. The demurrer was sustained as to Count 17 of the indictment and overruled as to the first sixteen counts. The plea in abatement demanded that the indictment be quashed, but, as claimed by appellant (opening brief, p. 7), the plea in abatement did not demand that an issue be tried before a jury [R. 70-75]. The plea in abatement was denied by the sustaining of a demurrer of the Government thereto.

After lengthy trial upon the issues presented by the first sixteen counts of the indictment, the jury returned a verdict of not guilty in favor of appellant as to Counts 1 to 13, inclusive, and a verdict of guilty as to Counts 14

to 16, inclusive. Appellant's motion for new trial was denied and appellant was sentenced to six months imprisonment upon each of the three counts upon which the verdict of guilty was returned, the sentence to run concurrently.

Each of the certificates of stock of Consolidated Mines of California, described in Counts 14, 15 and 16 of the indictment, were carried by the United States mails from one address in Los Angeles to another address in Los Angeles, for delivery to the purchasers thereof. Each certificate was signed by H. L. Wikoff, President, and Frank S. Tyler, Secretary, of Consolidated Mines of California. Each certificate was retransferred upon the books of Consolidated Mines of California and re-issued to the purchasers thereof, as named in Counts 14 to 16, inclusive, from stock then registered in the name of Frank S. Tyler.

The Question Presented by This Appeal Is:

Certificates of stock of a California corporation, as part of an interstate distribution, were carried by the United States mails for the purpose of sale and delivery after sale from one address within Los Angeles County to another address within the same county. The certificates so carried were retransferred by the corporation upon its records from stock previously registered upon its records in the name of an individual. The corporation was completely dominated and controlled by appellant, who was neither an officer nor a director of the corporation. Appellant and the individual in whose name the stock was previously registered directly participated in sales of the stock of the corporation and a portion of the proceeds from such sales was used for the benefit of the corporation. No registration statement for the stock of the corporation was filed with Securities and Exchange Commission. Appellant claims that the stock of the corporation sold was exempt from registration as the stock had theretofore been issued by the corporation to an individual, and was the "personally owned stock" of such individual. The individual in whose name such stock was registered and from whom such stock was transferred to the purchasers named in the indictment, was employed by appellant, dominated and controlled by appellant, and subject to the orders and directions of appellant. Appellant wilfully proceeds to sell and cause the sale and delivery after sale of the stock of the corporation.

Should the conviction of appellant for violation of the provisions of Section 5(a)(2) of the Securities Act of 1933 (Title 15, U. S. C., Section 77e(a)(2)) be upheld?

Summary of Argument.

I.

The Demurrer to Counts 14, 15 and 16 of the Indictment was Properly Overruled.

II.

The District Court Properly Sustained the Demurrer of the Government to the Plea in Abatement of Appellant.

(a) Appellant's Appearance and Testimony Before an Examiner of Securities and Exchange Commission Granted Appellant No Immunity as to the Matters about Which He Testified.

(b) The Production by Consolidated Mines of California of Its Books and Records under the Compulsion of a Subpoena Granted No Immunity to Appellant.

(c) Section 22(c) of the Securities Act of 1933, Insofar as it Requires a Person to Claim His Privilege, After He Is Called and Asked to Testify, Is Constitutional and Is Not in Violation of the Fifth Amendment to the Constitution of the United States.

(d) The District Court Properly Ruled That There Was No Issue to be Determined by a Jury as to Whether Appellant Was Entitled to Immunity.

III.

Appellant Cannot Here Question the Sufficiency of the Evidence as No Exception Was Taken to the Overruling of the Motion to Dismiss, at the Conclusion of the Government's Case, Nor Was Such Motion at Any Time Thereafter Renewed by Appellant.

(a) The Burden Is Upon the Appellant to Establish an Exemption from the Provisions of Section

5(a)(2) of the Securities Act of 1933. No Such Exemption Was Established.

(b) The Evidence That the Mailing of the Certificates of Stock Was in the Regular Course of Business of Appellant and Under His Direction Was Sufficient.

IV.

The Action of the Corporation Commissioner of the State of California in Issuing a Permit or Permits to Consolidated Mines of California, a California Corporation, to Issue Its Stock Is Immaterial and Irrelevant in a Prosecution for Violation of the Provisions of Section 5(a)(2) of the Securities Act of 1933.

(a) The Power to Regulate Commerce and the Use of the Mails Remains Free from Restrictions and Limitations Arising or Asserted to Arise by State Laws.

V.

Personally Owned Stock, As Such, Is Not Exempt From the Registration Provisions of the Securities Act of 1933 and the Instruction of the Trial Court to the Jury That It Was Immaterial That the Stock Sold Was or Was Not Personally Owned, Was Correct.

VI.

The Entire Record Must Be Considered upon This Appeal.

ARGUMENT.

I.

The Demurrer to Counts 14, 15 and 16 of the Indictment Was Properly Overruled.

Appellant asserts (opening brief, p. 17) that Counts 14, 15 and 16 of the indictment allege facts that show no crime was committed, as such counts allege an intrastate mailing of stock of a California corporation within the State of California. Appellant states that the Securities Act of 1933 specifically eliminates any mailing of stock of a corporation organized in a State and doing business within that State.

A casual examination of the Securities Act of 1933 discloses that the Act contains two alternative jurisdictional phrases, to-wit, the phrase "means or instruments of transportation or communication in interstate commerce" and the further jurisdictional phrase, "or by the use of the mails." See opinion of Judge St. Sure in *Securities and Exchange Commission v. Timetrust, Inc., et al.* (D. C. Calif.), 28 F. Supp. 34, and authorities cited therein.

The argument of appellant regarding the use of the mails in an intrastate mailing by a domestic corporation is possibly directed to the provisions of Section 3(a)(11) of Securities Act of 1933, which provides:

> "Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person

resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory." [See Appendix, p. 3.]

The provisions of Section 3, however, apply to exempted securities. This section does not, as appellant claims, show an intent on the part of Congress to exempt all local transactions in which the mails are used. It shows an intent to exempt only the use of the mails, where *the entire issue* is sold within the State by persons meeting the prescribed qualifications.

Counts 14, 15 and 16 of the indictment allege that no exemption from registration was available for the stock of Consolidated Mines, and as against demurrer, such allegation in the indictment must be taken as true. (See *United States v. Schmauder* (D. C. Conn.), 258 F. 251; *United States v. Doremus* (D. C. Tex.), 246 F. 958; *Knoell, et al, v. United States* (C. C. A. 3), 239 F. 16 (app. dis. 246 U. S. 648).)

This Court has held, in the case of *Woolley v. United States* (C. C. A. 9), 97 F. (2d) 258 (cert. denied, 305 U. S. 614, 59 S. Ct. 73, 83 L. Ed. 391) that an indictment need not set forth myriad details or satisfy every objection which human ingenuity may devise, but is sufficient if it charges every substantial element of offense and apprises accused of charge in such manner that he can prepare defense without being taken by surprise and be assured of protection against another prosecution for the same offense.

In fact, the allegation contained in Counts 14, 15 and 16 that no exemption from registration was available, was unnecessary. The Supreme Court in the case of *Edwards v. United States,* 312 U. S. 473, 61 S. Ct. 669, 85 L. Ed. 563, specifically held that an indictment charging conspiracy to violate the Securities Act of 1933 by selling unregistered securities, is not insufficient in failing to charge that the securities sold were not of the class exempted from registration under the Act and the Rules and Regulations thereunder.

The District Court properly held that Counts 14, 15 and 16 charged an offense and properly overruled the demurrer thereto of the appellant.

II.

The District Court Properly Sustained the Demurrer of the Government to the Plea in Abatement of Appellant.

Appellant (opening brief, pp. 48-56) argues as follows:

(a) Appellant's appearance and testimony before an examiner of Securities and Exchange Commission granted appellant immunity as to matters about which he testified.

(b) The production by Consolidated Mines of California of its books and records under the compulsion of a subpoena granted appellant immunity.

(c) Section 22(c) of the Securities Act of 1933, in so far as it attempts to require a person to claim his privilege after he is called and required to testify, is unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States.

(d) The District Court erred in denying to appellant a trial by jury on the issue of whether he was entitled to immunity.

A detailed discussion of each of the cases cited by appellant in alleged support of the foregoing contentions will not be made herein. Suffice it to say, the authorities cited by appellant do not sustain the contentions of appellant as applied to the facts of the case at bar.

(a) Appellant's Appearance and Testimony Before an Examiner of Securities and Exchange Commission Granted Appellant No Immunity as to the Matters About Which He Testified.

Appellant does not herein claim that he appeared before an examiner of Securities and Exchange Commission by reason of a subpoena or that he was requested or compelled to testify after having claimed his privilege against self-incrimination. The record discloses the contrary, to-wit, that appellant voluntarily and without subpoena appeared before the examiner and, after being duly sworn, was advised by the examiner concerning his constitutional privilege against self-incrimination. Such admonition was thereafter repeated to appellant upon two subsequent appearances. Appellant at all times was represented by counsel and at no time, during the course of the examinations, did appellant claim any privilege against self-incrimination [R. 93, 94, 95]. It must be assumed that appellant and his attorney decided the interests of appellant would be served best by the voluntary testimony of appellant before the examiner, even, in fact, if such testimony should be incriminating. Appellant at no place in his brief, claims that he was not expressly advised that he need not answer any questions which would tend to incriminate him or subject him to a penalty or forfeiture.

The learned Judge of the District Court, in sustaining the demurrer of appellee to the plea in abatement, concisely sets forth the facts and properly states the established law as to the contention of the appellant, as hereinbefore set forth [R. 97-103]. (*United States v. Shaw, et al,* 33 F. Supp. 531.)

Section 22(c) of the Securities Act of 1933 provides as follows:

> "No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpoena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing *concerning which he is compelled, after having claimed his privilege against self-incrimination,* to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying." (Italics added.) [See Appendix, p. 5.]

The provision of this statute that appellant must have claimed his privilege against self-incrimination, is plain and unambiguous. If any defendant considered that answering a question propounded while he was testifying would violate his constitutional rights, it was incumbent on him at the time to assert his privilege. (*Securities and Exchange Commission v. Torr, et al* (D. C. N. Y.), 15 F. Supp. 144.)

The action of appellant in voluntarily testifying before an examiner of Securities and Exchange Commission, without any claim or assertion of his constitutional privilege of self-incrimination, is on all fours with that of the appellant in the case of *Vajtauer v. Commissioner of Im-*

migration, 273 U. S. 103, 113, 47 S. Ct. 302, 71 L. Ed. 560, wherein Chief Justice Stone stated (page 113 of 273 U. S.):

> "Throughout the proceedings before the immigration authorities, he did not assert his privilege or in any manner suggest that he withheld his testimony because there was any ground for fear of self-incrimination. His assertion of it here is evidently an afterthought. . . . The privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal which must pass upon it. . . . This conclusion makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under State statutes or whether this case is to be controlled by Hale v. Henkel, 201 U. S. 43; Brown v. Walker, 161 U. S. 591, 608; compare United States v. Saline Bank, 1 Peters 100; Ballmann v. Fagin, 200 U. S. 186, 195."

Appellant in his appearances before the examiner of Securities and Exchange Commission, was specifically advised of his right to claim protection guaranteed under the Fifth Amendment to the Constitution. There was no requirement upon the Government so to advise appellant. In *Thompson, et al., v. United States* (C. C. A. 7), 10 F. (2d) 781, the authorities are reviewed and it is stated as follows (p. 784):

> ". . . As to the Fifth Amendment, the only clause which defendant may invoke reads: 'No person * * * shall be *compelled* in any criminal case to be a witness against himself.'
>
> "[6] Attention must be focused on the word 'compelled.' While Thompson could not be 'compelled' to be a witness against himself, he could *voluntarily*

offer his books and papers and take the stand. To deny one the right voluntarily to testify in his own behalf would be to deny the innocent a more valuable right than the one which protects him against being compelled to be a witness against himself. While the government may practice no deception, fraud, or duress upon the accused in order to obtain possession of evidence, it was not required to advise him of his right to claim (or his right to waive) the protection guaranteed under the Fifth Amendment. Wilson v. United States, 162 U. S. 613, 16 S. Ct. 895, 40 L. Ed. 1090; Powers v. United States, 223 U. S. 313, 32 S. Ct. 281, 56 L. Ed. 448; Knoell v. United States, 239 F. 21, 152 C. C. A. 66; United States v. Wetmore (D. C.), 218 F. 227.

"In such a situation as confronted Thompson, it was for him to decide whether he would be helped or hurt by refusing to produce the evidence demanded by the subpoena. In his dilemma, it seemed best to seek the advice of counsel. He did so. Thereafter he took the position that his employees should not only respond to the subpoena and produce the documents, but he volunteered to aid in the investigation and to appear himself before the grand jury. That he waived his privilege, or, to put it in another way, exercised his option (Wigmore on Evidence [2d Ed.] §2268), to appear voluntarily, is a conclusion concerning which we have no doubt."

Appellant contends that the request of the examiner of Securities and Exchange Commission that he appear and testify, even though such request was not accompanied by a subpoena, is sufficient to indicate that appellant was compelled to testify. Assuming that the request of the examiner imported, for this purpose, as much compulsion

as a subpoena, the plea in abatement fails to allege facts sufficient to show that appellant was compelled to testify. Merely to compel a witness to attend is not to compel him to testify. (*United States v. Kimball* (D. C. N. Y), 117 F. 156.)

A witness cannot claim his privilege until he has been sworn. (*United States v. Kimball, supra.*)

Therefore, there can be no prior compulsion and no resultant grant of immunity. (See *Sherwin v. United States,* 268 U. S. 369, 69 L. Ed. 985, 45 S. Ct. 517.)

Appellant asserts, broadly, that the mere testifying itself grants appellant an immunity from prosecution and argues that such assertion is supported by the case of *Counselman v. Hitchcock,* 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110. An examination of the *Counselman* case, however, discloses that it does not sustain the contention of appellant. Counselman was summoned before a Federal Grand Jury investigating certain alleged violations by officers of certain railroads charged with giving rebates in violation of the Interstate Commerce Act. He refused to answer questions as to whether he had received, or knew of any officer of the companies granting, any shippers of merchandise rates less than the traffic or open rate, stating that his answers might criminate him, pleading his constitutional immunity. Mr. Justice Blatchford, in the opinion of the Court, at page 562 of 142 U. S., states:

> "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."

And, at page 566 of 142 U. S., further and in quoting from the opinion of Chief Justice Marshall in *United States v. Aaron Burr,* 25 F. Cas. No. 14,692a:

> " 'It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws.' "

It will thus be observed that the Supreme Court in the *Counselman* case throughout focuses attention upon the word "compelled" as was done so forcefully in the case of *Thompson, et al. v. United States, supra.*

It should be further noted, however, that the statute under interpretation in the *Counselman* case did not contain a similar proviso to that contained in Section 22(c) of the Securities Act of 1933, requiring a claim of privilege by the witness against self-incrimination.

The cases cited by appellant (opening brief, pp. 48-56) do not hold that it is unconstitutional for a statute to withhold the privilege unless claimed. The statutes under consideration in these cases expressly conferred the immunity even though the witness did not claim it, and the courts were careful to point out that they would have a different situation before them if the statute required that the witness claim the immunity at the time he was compelled to testify.

For example, appellant (opening brief, pp. 50-51) quotes at length from *United States v. Goldman* (D. C. Conn.), 28 F. (2d) 424, wherein the statute under con-

sideration was a section of the National Prohibition Act, which did not require that the witness claim his constitutional privilege at the time he was compelled to testify. The distinction between this statute and Section 22(c) of the Securities Act was clearly recognized by the Court, which stated (p. 436):

> "If amnesty were to be available only to those who protested, it would have been a simple matter for the Congress to have added to Section 30 the following language:
>
> "'But no person shall be entitled to the benefits hereof unless he shall before testifying, declare to the court his refusal to testify on the ground of self-incrimination.'"

Section 22(c) of the Securities Act was under consideration in the case of *Edwards v. United States* (C. C. A. 10), 113 F. (2d) 286. The Circuit Court affirmed the conviction in the District Court, which affirmance, however, was reversed by the Supreme Court in the case reported in 312 U. S. 473, 61 S. Ct. 669, 85 L. Ed. 563. The opinion of the Supreme Court will be discussed hereinafter. It is believed that such opinion of reversal does not in fact modify or overrule a pronouncement of the Circuit Court of Appeals. In the opinion by Judge Bratton, at pages 288-289, it is stated:

> "Section 22(c) of the act provides that no person shall be excused from testifying or producing books or documents before the commission or any officer designated by it on the ground that the testimony or documentary or other evidence required of him

may tend to incriminate him or subject him to a penalty or forfeiture; but that no individual shall be prosecuted for or on account of any transaction, matter or thing about which he is compelled to testify, after having claimed his privilege against self incrimination. The burden rested upon appellant to prove that he was served with process requiring him to appear and produce certain books and records relating to the subject matter of the prosecution, that he claimed his immunity against self incrimination, and that despite such claim he was required to testify concerning his identity and relationship to the trusts and organizations referred to in the indictment. The record fails to indicate that any evidence was offered to sustain these allegations of fact. And in the absence of such evidence the plea was properly denied." (Citing, *Lee v. United States*, 91 F. (2d) 326, cert. denied 302 U. S. 745, 58 S. Ct. 263, 82 L. Ed. 576, and other cases.)

The Supreme Court, however, in the opinion by Mr. Justice Reed, page 567 of 85 L. Ed., said:

"It is next urged that the plea was properly overruled because of petitioner's failure to prove its allegations. (citations.) Such result is assumed to follow on the theory that as the burden was on petitioner to prove his plea, the failure of the record to show an offer of proof justifies the order. As appears from the preceding statement of the case, the trial court overruled not only the plea in bar but petitioner's motion for production of the transcript, which was certainly the best evidence of whether the testimony before the commission was sufficiently related to the prosecution to support amnesty. In the Martin case (citations), this Court said the action dismissing a traversed motion for failure of proof would have

been reversed if the opportunity to establish the facts by evidence had been denied the accused. *Treating the Government's motion to strike the plea in bar as a traverse of that pleading which would justify the order overruling it in the absence of a showing in the record of an offer of proof,* that result does not follow where, as here, the plea is accompanied by a motion for the production of the transcript of the former evidence. The plea and motion showed that application had previously been made to the Securities and Exchange Commission for the transcript and had been refused." (Italics added.)

The burden to prove the facts was upon the appellant and lack of evidence entitled the Government to an overruling of the plea. (*Kastel v. United States* (C. C. A. 2), 23 F. (2d) 156.) Verified pleadings are not evidence in support of the motion. (*Martin v. Texas,* 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338.)

In the case at bar, the Government traversed the plea in abatement by its motion to strike [R. 90] and the order of the District Court [R. 96] overruling the plea was justified, as the record discloses a complete absence of an offer of proof upon the part of appellant.

(b) The Production by Consolidated Mines of California of Its Books and Records Under the Compulsion of a Subpoena Granted No Immunity to Appellant.

It was only after the decision of this Court in the case of *Consolidated Mines of California, et al. v. Securities and Exchange Commission,* 97 F. (2d) 704, decided June 30, 1938, that the books and records of the corporation were in fact produced.

There can be no question but that the books and records of the corporation may be produced under the compulsion of a subpoena and used as evidence against an officer or agent thereof. (*Brown v. United States,* 276 U. S. 134, 142, 48 S. Ct. 288, 72 L. Ed. 500; *Schenck v. United States,* 249 U. S. 47, 50, 39 S. Ct. 247, 63 L. Ed. 470.)

The same rule has been applied as to the books and records of unincorporated associations. (See *Davis, et al. v. Securities and Exchange Commission* (C. C. A. 7), 109 F. (2d) 6, cert. denied 309 U. S. 687, 60 S. Ct. 889, 84 L. Ed. 1030.

(c) Section 22(c) of the Securities Act of 1933, Insofar as it Requires a Person to Claim His Privilege, After He Is Called and Asked to Testify, Is Constitutional and Is Not in Violation of the Fifth Amendment to the Constitution of the United States.

No voluminous citation of authority is necessary to sustain this proposition.

This Court in *Coplin, et al. v. United States,* 88 F. (2d) 652, cert. denied 301 U. S. 703, 57 S. Ct. 929, 81 L. Ed. 1357, has declared the Act constitutional.

Section 22(c) was assumed to be valid in *Edwards v. United States,* 312 U. S. 473, 61 S. Ct. 669, 85 L. Ed. 563; *Davis, et al. v. Securities and Exchange Commission* (C. C. A. 7), 109 F. (2d) 6, cert. denied 309 U. S. 687, 60 S. Ct. 889, 84 L. Ed. 1030.

(d) The District Court Properly Ruled That There Was No Issue to be Determined by a Jury as to Whether Appellant Was Entitled to Immunity.

The record clearly discloses that there was no question of fact to be decided by a jury in connection with the attendance of appellant before the examiner of Securities and Exchange Commission [R, 99-100]. The admitted facts are that appellant appeared voluntarily and voluntarily testified.

The correct rule in regard to trial of preliminary issues by a jury is stated in Housel and Walser, *Defending and Prosecuting Federal Criminal Cases* (1938), in #337:

> "After a plea in abatement or in bar is interposed the Court usually sets a date for a hearing thereon. If no questions of fact arise, a plea in abatement or in bar is disposed of by the Court (Bassett v. U. S., 9 Wall. (76 U. S.) 38, 19 L. ed. 548; U. S. v. Peters, 87 F. 984, aff'd 94 F. 127); and even if questions of fact are presented the Court generally determines the issues itself, although it may in its discretion summon a jury to assist it. (Jones v. U. S., 179 F. 584.)"

Some courts have put the preliminary issue to the same jury that decided the ultimate issue of guilt. However, these cases, and the cases cited by appellant, in which preliminary questions were put to a jury, do not hold that such procedure is mandatory. In view of the above statement that such juries are discretionary and advisory only, the fact that they have occasionally been used does not determine that every defendant is entitled to a jury on preliminary questions.

The discretionary and advisory aspect of these juries is illustrated by the case of *Thompson v. United States,* 155 U. S. 271, 39 L. Ed. 146, 15 S. Ct. 73, in which the judge instructed the jury to find *against* the defendant on the preliminary issues. If the defendant had been entitled to a jury trial, including all the incidents connected with a common law jury, the judge could not have instructed the jury to find *against* the defendant. The fact that he did so instruct indicates that the jury trial on the preliminary issues was not the ordinary trial by jury to which a defendant is constitutionally entitled on the ultimate fact of his guilt in a criminal trial. The common law jury is entitled to find all facts necessary for the crime, even though they are not disputed. (*People v. Marendi,* 107 N. E. 1058, 213 N. Y. 600.)

The District Court correctly held that as there was no issue of fact in controversy, there was nothing to be submitted to a jury.

III.

Appellant Cannot Here Question the Sufficiency of the Evidence as No Exception Was Taken to the Overruling of the Motion to Dismiss, at the Conclusion of the Government's Case, Nor Was Such Motion at Any Time Thereafter Renewed by Appellant.

It is now the established rule, notwithstanding the provisions of Title 28, U. S. C., Section 391 [Appendix, p. 6], that the Appellate Court will not decide the question of the sufficiency of the evidence in the absence of a request for an instructed verdict, unless it is satisfied that there has been a miscarriage of justice. See an elaborate analysis of the rule and of Title 28, U. S. C., Section 391, by Judge Munger in *Feinberg v. United States* (C. C. A. 8), 2 F. (2d) 955.

This Court has so held.

See,

Paine, et al. v. United States, 7 F. (2d) 263;
Fasulo v. United States, 7 F. (2d) 961;
Pawley v. United States, 73 F. (2d) 907.

While no exception in the case at bar was taken to the overruling of the motion to dismiss, at the conclusion of the Government's case, this Court has held that notwithstanding such an exception, the point is waived if the defendant puts on evidence in his own behalf after the close of the Government's case and fails to renew his motion for a directed verdict.

Steffen v. United States, 293 F. 30;
Fasulo v. United States, 7 F. (2d) 961;
Marron, et al. v. United States, 8 F. (2d) 251;
Heskett, et al. v. United States, 58 F. (2d) 897.

In *Sharples Separator Co. v. Skinner*, 251 F. 25, 27, the late Judge Gilbert, of this Court, said:

> "The defendant at the close of the testimony having made no motion for an instructed verdict, on the ground of the insufficiency of the evidence to sustain a verdict against it, we are precluded from considering any questions other than the rulings of the trial Court in excluding or admitting evidence, and in giving or refusing instructions to the jury."

The facts herein differ from those in the reported cases, where, to prevent a miscarriage of justice, due to the negligence, ignorance or inadvertence of counsel, the rights of the accused were not properly safeguarded. The outstanding professional ability and character of counsel, C. C. Montgomery, Esquire, appointed by the District Court to represent appellant in the trial in the District Court, are well known to this Court.

However, it will be noted herein that the argument of appellant (opening brief, pp. 30-42) that the evidence herein is insufficient, is unsound.

(a) The Burden Is Upon the Appellant to Establish an Exemption From the Provisions of Section 5(a)(2) of the Securities Act of 1933. No Such Exemption Was Established.

Appellant states that the certificates of stock of Consolidated Mines of California, which were mailed to the investors named in Counts 14, 15 and 16, were issued from stock certificate No. 716 of the corporation which, prior to re-issue, had been registered upon the corporate records in the name of Frank S. Tyler. The prior registration in the name of Tyler, however, is immaterial to the issues in this case.

The witness Jacobson was called by the Government as its witness. He was later recalled as a witness by the defense.

Appellant (opening brief, pp. 31-32) quotes the testimony of this witness to the effect that the certificates mailed to the investors named in the foregoing counts, in fact, came from "private stock."

It is fundamental that a party is bound by the testimony of his witness as to the facts upon which the witness has properly testified. Conclusions volunteered by the witness, however, do not come within the established rule and, in fact, are not part of the evidence in the case and could be properly stricken from the record.

The argument of appellant, however, as to the interpretation of Section 4(1) [Appendix, p. 3] of the Act, as applied to the so-called "personally or privately owned stock" of Frank S. Tyler, cannot be sustained. That section provides:

> "The provisions of section 5 shall not apply to any of the following transactions:

"(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer (including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was *bona fide* offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter."

As disclosed by the record, Consolidated Mines of California was the *alter ego* of appellant who entirely dominated and controlled the corporation. Tyler was the employee of appellant and both Tyler and appellant participated in the distribution of the stock of the corporation. A portion of the proceeds from the sale of the stock of the corporation was used for the benefit of the corporation and furthering its alleged mining activities. The investors named in Counts 14 and 15 of the indictment, through their negotiations with *appellant,* purchased stock of Consolidated Mines of California which was immediately available to them by re-issue from stock then registered in the name of Tyler.

Clearly, if Tyler or appellant or both of them, under the facts, were an issuer, underwriter or dealer, the exemption afforded by Section 4(1) [Appendix, p. 3] of the Act was not available to them or either of them.

In *Landay v. United States* (C. C. A. 6, 1939), 108 F. (2d) 698, 704, in affirming a conviction of corporate officers for violation of Section 5 of the Securities Act of 1933, the corporation not being indicted, the Court said:

> "Appellants, therefore, who are clearly shown to have caused the issuance of this stock, fell within the sweeping provision of the first clause, which applies the penalty of the statute to 'every person who issues or proposes to issue any security.' As appellants by voting their shares of stock in a block completely dominated the corporation, the acts of the corporation were their individual acts (*McCandless, Receiver, v. Furland*, 296 U. S. 140, 165, 56 S. Ct. 481, 80 L. Ed. 121), and they are issuers within the meaning of the statute."

Appellant, however, seeks to construe Section 4(1) of the Act as though it exempted from the provisions of Section 5(a) all activities of any person other than an issuer, underwriter, or dealer. This is not, however, what Section 4(1) either states or means. The exemption is limited to "transactions" by any person other than an issuer, underwriter, or dealer. It thus leaves subject to the Act all activities, no matter by whom carried out, which are part of a transaction of sale by an issuer. The exemption applies only when the activities are not part of such a transaction, as, for example, ordinary trading transactions between individual investors. Appellant's construction of Section 4(1) is clearly contrary to the Congressional purpose. The aim of the Act as a whole is to require disclosure of material facts concerning securities when they are the subject of distribution by an issuer or controlling stockholder; it imposes no registration requirement when the securities are the subject of ordinary

sales between individual investors. Section 4(1) draws the line of distinction by exempting from the registration procedure transactions which are not customarily a part of the distribution process, that is, transactions in which neither an issuer, an underwriter, nor a dealer (selling during the period of distribution) takes part. But the section does not, and was not intended to (see House Report No. 85, 73d Congress, First Session, page 15, which stated on the bill which became the Securities Act of 1933, with respect to Section 4(1):

> "Paragraph (1) broadly draws the line between *distribution* of securities and *trading* in securities, indicating that the Act is, in the main, concerned with the problem of distribution as distinguished from trading."

grant an exemption to any person performing an essential function to the distribution of securities by an issuer.

Appellant (and Tyler) were clearly in the position of underwriters as defined by the Securities Act. Section 2(11) [Appendix, p. 2] of the Act defines "underwriter" as "any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking . . ."

In the case at bar Tyler, dominated and controlled by Shaw, "purchased from the issuer with a view to distribution." Distribution was made with appellant participating in the undertaking. Both, therefore, are underwriters within the meaning of the Act. Or, if it may be contended that Tyler alone was the underwriter, then appellant is equally liable as an aider and abettor or as a participant in the cause of action. (See *Coplin v. United*

States (C. C. A. 9), 88 F. (2d) 652, 660, 661; also *Shreve v. United States* (C. C. A. 9), 103 F. (2d) 796, 813.)

Under Section 2(11), appellant and Tyler were underwriters since they sold "for an issuer in connection with the distribution." It was through their solicitation of offers to buy that a distribution of the stock of Consolidated Mines of California was effected. As heretofore stated, the record is clear that at least a portion of the money received by appellant from the sales of the Consolidated Mines of California stock was in fact used by the corporation. (See *Securities and Exchange Commission v. Chinese Consolidated Benevolent Association, Inc.* (C. C. A. 2), 120 F. (2d) 738 (cert. ....., 86 L. Ed. 68, 62 S. Ct. 106).)

Appellant states (opening brief, p. 41) there was no public offering of the stock of Consolidated Mines of California. The facts, as disclosed by the record herein, conclusively show that the offering in fact, was public, and interstate. The holding of this Court in *Securities and Exchange Commission v. Sunbeam Gold Mines Company, et al.*, 95 F. (2d) 699, is exactly contrary to the interpretation given same by the appellant and set forth at page 41 of his brief.

This Court, in the *Sunbeam* case, follows the established rule in stating that appellant, in claiming to be within the terms of exception of transactions not involving public offering, has burden to prove that he belongs to the excepted class, and that the terms of the exemption must be strictly construed against appellant.

The trial court clearly was correct in instructing the jury that:

> "The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant."

This instruction did not alter the burden upon the Government to prove appellant guilty beyond a reasonable doubt, or place any burden of proof on the defendant contrary to the principles of criminal law. This instruction merely placed the onus of showing an exemption, if one was claimed. It meant no more than that the Government had stated a complete case without negativing the availability of exemptions unless they were claimed.

In *Merritt v. United States* (C. C. A. 9), 264 F. 870 (reversed on confession of error, 255 U. S. 579, 65 L. Ed. 795, 41 S. Ct. 375) this Court said (p. 875):

> "Error is said to have been committed because there was no evidence introduced by the government in support of the negative allegations of the indictment. There was no error in this respect, for, after the evidence of the prosecution, it devolved upon the defendant on trial to introduce evidence which would bring him within the exceptions of the provisions of the statute."

Clearly, appellant does not come within the exemptions afforded by Section 4(1).

(b) The Evidence That the Mailing of the Certificates of Stock Was in the Regular Course of Business of Appellant and Under His Direction Was Sufficient.

Appellant contends there was no showing that appellant caused the mailing of the stock certificates described in Counts 14, 15 and 16. This contention ignores the evidence. The record reveals that stenographers, chosen and employed by appellant, as a regular part of their duties and in the regular course of business, prepared correspondence dictated by appellant and others in the office of appellant directed to prospects and to stockholders of Consolidated Mines of California; that they prepared circular and form letters, and forwarded stock certificates or other things of "value" by registered mail.

Dr. Arnold, the investor witness named in Count 14, testified that he was the physician for appellant and as a result of discussions with appellant, ordered 250 shares of stock of Consolidated Mines of California. Shortly after placing this order with appellant, Dr. Arnold received his stock certificate through the United States mails.

Regina Woodruff, the investor witness named in Count 15, had previously purchased Monolith stock through the office of appellant. She called the office of Consolidated Mines of California and, after she was unable to speak with Mr. Tyler, was told she could talk with Mr. Shaw. As a result of the telephone conversation, she placed her order for the stock of Consolidated Mines of California and thereafter duly received her certificate through the United States mails.

The record is silent regarding the individual with whom investor witness Eva M. Goodrich, named in Count 16,

had her transactions which resulted in the receipt by her through the United States mails of a stock certificate. For the purpose of this appeal, it is unnecessary to consider the sufficiency of the evidence of mailing in connection with Count 16. Clearly, the evidence of mailing is sufficient as to the transactions had with the investors named in Counts 14 and 15, and the judgment of the District Court must be affirmed if the defendant was properly convicted under any count good and sufficient in itself to support the judgment.

See:

Whitfield v. Ohio, 297 U. S. 431, 438;
Brooks v. United States, 267 U. S. 432, 441;
Abrams v. United States, 250 U. S. 616, 619;
Evans v. United States, 153 U. S. 584, 595;
Claassen v. United States, 142 U. S. 140, 146;
Gantz v. United States (C. C. A. 8), decided April 28, 1942.

This Court has held that the mailings were properly received in evidence.

See:

Shreve, et al. v. United States (C. C. A. 9), 103 F. (2d) 796;
Greenbaum, et al. v. United States (C. C. A. 9), 80 F. (2d) 113.

See, also:

Gantz v. United States (C. C. A. 8), decided April 28, 1942.

IV.

The Action of the Corporation Commissioner of the State of California in Issuing a Permit or Permits to Consolidated Mines of California, a California Corporation, to Issue Its Stock Is Immaterial and Irrelevant in a Prosecution for Violation of the Provisions of Section 5(a)(2) of the Securities Act of 1933.

Throughout appellant's brief and the supplement thereto appellant contends that the issuance, by the Corporation Commissioner of the State of California, of a permit for the issuance of stock of Consolidated Mines of California, provided a full and fair disclosure of the character of the stock sold, and an implied approval thereof, and that apparently, there was no duty upon the part of appellant or Consolidated Mines of California, to comply with the provisions of the Securities Act of 1933; that the issuance of such permit by a State official in fact nullified the provisions and the requirements of the Federal legislation. The contention answers itself.

The Securities Act of 1933 followed the enactment of what has generally been called the Blue Sky Laws of the various States, and the ingenuity and fertility of resources of those dealers in securities who deliberately attempted to avoid their application supplied the background of experience against which this legislation was written. Congress has the power to refuse the use of the mails to those conducting an unlawful intrastate enterprise, even where the offense is local and subject only to State prosecution. (*Securities and Exchange Commission v. Crude Oil Corporation of America, et al.* (C. C. A. 7), 93 F. (2d) 844, 847, 849.)

(a) The Power to Regulate Commerce and the Use of the Mails Remains Free From Restrictions and Limitations Arising or Asserted to Arise by State Laws.

It is unquestioned that Congress is not fettered by State law in the regulation of the instrumentalities of interstate commerce. In *United States v. Delaware and Hudson Company,* 213 U. S. 366, 29 S. Ct. 527, 53 L. Ed. 836, at page 405 of the United States Report, the Supreme Court said:

> ". . . The power to regulate commerce possessed by Congress is, in the nature of things, ever-enduring, and therefore the right to exert it today, tomorrow, and at all times in its plenitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate."

See, also:

In re Community Power & Light Company (D. C. N. Y.), 33 F. Supp. 901.

In *United States v. Bogy* (D. C. Tenn.), 16 F. Supp. 407, the indictment under Section 17(a) of the Securities Act was challenged on the ground that "the incidental use of the mails in a transaction of the sale of securities does not bring within the power of Congress authority and control of the sale of such securities." The indictment was found valid, the case was affirmed on appeal (C. C. A. 6), 96 F. (2d) 734, and certiorari was denied, 305 U. S. 608, 83 L. Ed. 387, 59 S. Ct. 101.

Appellant (opening brief, p. 21) quotes from the opinion of the Court in *Electric Bond & Share Company v. Securities and Exchange Commission*, 92 F. (2d) 580, 586, as follows:

> "A holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce."

Appellant then states:

> "It will thus be seen that the purpose of the Securities and Exchange Act is to regulate the flow of securities in interstate commerce and the use of the mail facilities in that respect, and that a company whose business is predominantly intrastate need not register even though it makes use of the mails.
>
> "While the Electric Bond & Share Company case involved that of a holding company, which enactment was an amendment to the original Securities Act of 1933, it is held in the Circuit Court opinion that 'a holding company whose interests and business are predominantly intrastate need not register even though it makes use of the mails and the channels of interstate commerce.'
>
> "We have repeated this language, which we have heretofore quoted, because it fits the particular case at bar."

Appellant overlooks the fact that Public Utility Holding Company Act of 1935 (15 U. S. C. Section 79), was enacted more than two years after the effective date of the

Securities Act of 1933, is separate and distinct legislation, and is no part of Securities Act of 1933. Public Utility Holding Company Act in Sections 4(a) and 5 (15 U. S. C. Section 79d(a) and 79e) provides for the registration of holding companies with Securities and Exchange Commission. The registration provisions of Securities Act of 1933 are not before the Court in the *Electric Bond & Share Company* case, *supra.*

Appellant attempts to class the stock of Consolidated Mines of California as an exempted security, under the provisions of Section 3(11) of the Securities Act of 1933. Such section, however, is not here applicable. The record shows that solicitations and sales were made to persons resident of the State of Oregon. This fact is admitted by appellant (opening brief, p. 22). Section 3(11) specifically applies only to an intrastate distribution, in the State of incorporation.

V.

Personally Owned Stock, as Such, Is Not Exempt From the Registration Provisions of the Securities Act of 1933 and the Instruction of the Trial Court to the Jury That it Was Immaterial That the Stock Sold Was or Was Not Personally Owned, Was Correct.

Appellant contends that this Court in its decision in the case of *Consolidated Mines of California, et al. v. Securities and Exchange Commission, supra,* held that if the stock sold was "personally owned," it was not within the provisions of the Securities Act of 1933 and that such holding by this Court was the law of the case which the District Court in the trial of appellant, was bound to follow.

The decision of this Court affirmed the order of the District Court in directing the corporation and its officers to produce documentary evidence before the examiner of Securities and Exchange Commission. Appellant was not a party in that proceeding and, as he repeatedly asserts herein, was not a director nor an officer of Consolidated Mines of California. This Court said in its opinion at page 707:

> "The appellants do not deny that sales were made and solicited, or that the mails and the means and instruments of communication in interstate commerce were used for this purpose. They say, however, that the sales were made by appellant Tyler of his personally owned stock, independently of the company. The Commission had substantial evidence to the contrary. Letters soliciting sales or encouraging purchases were written on the stationery of the corporation and in some instances the signers designated

> themselves as corporate officers. The proceeds of the securities sold were in part loaned or contributed to the corporation and were used to keep the properties in operation thereby enabling more stock sales to be effected. Certainly, the facts in the possession of the Commission justified an investigation to determine whether the sales were in truth the individual transactions of Tyler, or were made on behalf or at the behest of the corporation."

Appellant places reliance upon the last sentence of the above quotation.

As set forth in the opinion of this Court, however, in the above case, Securities and Exchange Commission had ordered an investigation of the facts concerning alleged violations of the provisions of Sections 5 and 17(a) of the Act. Section 17 [Appendix, p. 4] of the Act prohibits fraudulent interstate transactions. Section 17(c) provides as follows:

> "The exemption provided in Section 3 shall not apply to the provisions of this Section."

As heretofore noted, Section 3 designates *securities* which are exempted from the provisions of the registration requirements of the Act. The provisions of Section 17 are unrelated to the registration provisions of the Act. This Court held that the investigation ordered by Securities and Exchange Commission to determine whether Sections 5 and 17(a) had been or were being violated, was justified and that it was immaterial whether or not the sales of stock were the individual transactions of Tyler or were made on behalf or at the behest of the corporation.

As appellant was not a party in *Consolidated Mines of California, et al. v. Securities and Exchange Commission,* and as the parties and the subject matter were different, any pronouncement by this Court in the earlier case was not the law of the case at bar and which the District Court was bound to follow. The "Law of the Case" is a ruling or decision once made in a particular case by an Appellate Court and, while it may be overruled in other cases, is binding and conclusive both upon the inferior court in any further steps or proceedings *in the same litigation* and upon the Appellate Court itself in any subsequent appeal or other proceeding for review. (Italics added.) (See *Standard Sewing Machine Co. v. Leslie* (C. C. A. 7), 118 F. 557, 559.

Appellant fails to name any provision of the Act which exempts "personally owned stock" from the registration provisions, because no such exemption, in fact, exists. While it may be repetitious (see p. 45 of this brief), the Act shows that "personally owned stock" is not exempt. Thus in Section 2(11) it defines the term "underwriter" to mean, among other things, "any person who has purchased from an issuer with a view to . . . the distribution of any security." It seems clear that a person who has purchased securities from an issuer and then distributes them is distributing his "personally owned stock." Section 2(11) also defines the term "underwriter" to include also a person who "sells for" an issuer in connection with the distribution of any security. The last sentence of Section 2(11) extends the definition of "underwriter" to include a person who purchases from or sells for a person who controls the issuer.

There is no merit to appellant's contention that Section 5(a) of the Securities Act is unconstitutional in so far as it attempts to restrict a person from selling personally owned stock.

The Act is constitutional (*Jones v. Securities and Exchange Commission,* 12 F. Supp. 210, aff'd, 79 F. (2d) 617, reversed on other grounds, 298 U. S. 1, 56 S. Ct. 654, 80 L. Ed. 1015; *Coplin, et al. v. United States* (C. C. A. 9), 88 F. (2d) 652, cert. denied 301 U. S. 703, 57 S. Ct. 929, 81 L. Ed. 1357.)

In the case of *Louisville & Nashville R. R. v. Mottley,* 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, the Court reviewed some of the cases bearing on the right of Congress to regulate private rights when they conflict with the public interests, and said (p. 480 of 219 U. S.):

> "There are certain propositions at the base of this inquiry which we need not discuss at large, because they have become thoroughly established in our constitutional jurisprudence. One is that the power granted to Congress to regulate commerce among the states and with foreign nations is complete in itself, and is unrestricted except by the limitations upon its authority to be found in the Constitution. *Gibbons v. Ogden,* 9 Wheat. 1; *Brown v. Maryland,* 12 Wheat. 419; *Addyston Pipe and Steel Co. v. United States,* 175 U. S. 211, 229; *Scranton v. Wheeler,* 179 U. S. 141, 162, 163; *C., B. & Q. R. R. Co. v. Drainage Com'rs.,* 200 U. S. 364, 400; *Atlantic Coast Line R. R. Co. v. Riverside Mills,* 219 U. S. 186, 202.
>
> "In the *Addyston Pipe* case, this court said that, under its power to regulate commerce, Congress 'may enact such legislation as shall declare void and prohibit the performance of any contract between in-

dividuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce'."

Again at page 228 of the *Addyston Pipe* case, ***supra,*** the court said:

"We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts.

"But it has never been, and in our opinion ought not to be, held that the word (liberty) included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce, and in violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature, while in the exercise of its constitutional right to regulate commerce among the States . . . Anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce."

Appellant queries [Supplement to opening brief, p. 14] as follows:

> "Where the only stock involved in the alleged violation was personally owned stock transferred from one owner to another and sold by the second owner, is such stock within the exemption of Section 3(10)?"

Clearly, however, this section affords appellant no relief. It provides for the exchange of one security for another security, where the terms and conditions of such issuance and exchange are approved after a hearing . . . by any . . . governmental authority expressly authorized by law to grant such approval [Appendix, p. 3]. In the case at bar, there was no "exchange" of one security for another or different security; it was a re-transfer from the alleged "personally owned stock" of Tyler to the investors. It should be noted that the issuance of the stock of Consolidated Mines of California to residents other than of the State of California, as conclusively appears from the record, was in direct violation of the terms of the permit from the Corporation Commissioner of the State of California. The California statute provides (appellant's opening brief, p. 2):

> ". . . The commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, *in this state* . . ." (Italics added.)

Clearly, Section 3(10) of the Securities Act affords no exemption to the appellant herein.

VI.

The Entire Record Must Be Considered Upon This Appeal.

Appellant feebly contends (opening brief, pp. 22, 23, 41) that the entire record in this case cannot be considered with relation to the three counts upon which appellant was convicted. In support of such contention, appellant cites the case of *Dunn v. United States,* 284 U. S. 390, for the proposition that each count of an indictment is regarded as if it were a separate indictment. However, an examination of the *Dunn* case fails to disclose that the Court held that where certain evidence is presented as to each count, that evidence alone can be considered. The complete picture of the relationship of appellant with Consolidated Mines of California and with the distribution and sale of its stock was properly before the Court and admissible in support of not only Counts 1 to 13, inclusive, but also Counts 14 to 16, inclusive, of the indictment. Appellant argues that the evidence discloses he was in fact exempted from the registration provisions of the Act. Although such contention has no factual basis, nevertheless, if for no other reason or purpose, it was proper for the Government to show the relationship and connection of appellant with the distribution and sale of the stock of Consolidated Mines of California to meet any possible contention of the defendants that in fact, an exemption from registration existed. It is well settled that where an indictment charges separate offenses, where the evidence offered to sustain one count was properly admissible and relevant to sustain the other, such offenses are properly joined, as in the instant case. See *McNeil v. United States* (C. C. A. D. C.), 85 F. (2d) 698, and cases therein cited.

Conclusion.

Appellant (opening brief, pp. 61, 62) quotes the Message of the President to the Congress, March 29, 1933, as to the fundamental purpose of the Securities Act of 1933.

Such quotation concisely and exactly expresses the stand of the Government as to the transactions upon which appellant herein was convicted and from which conviction he has appealed to this Court. As the promoter of Consolidated Mines of California and as the individual completely and entirely dominating and controlling such corporation, he chose to ignore the plain provision of Section 5(a) of the Act, by failing to register the securities sold to an investing public, notwithstanding the opinions of representatives of Securities and Exchange Commission and the advice of his own counsel that registration was required.

After a full and fair trial, appellant was found guilty as charged.

It is respectfully submitted that the conviction of appellant is amply supported by the evidence and that the judgment of the District Court should be affirmed.

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APPENDIX.

Sections 2(4), (7), (8), (11), 3(a)(10), (a)(11), 4(1), 5(a), 17(a)(c), 22(c), and 24 of the Securities Act of 1933, 48 Stat. 74, as amended (15 U. S. C. Secs. 77b(4), (7), (8), (11), 77c(a)(10), (a)(11), 77d(1), 77e(a), 77q(a)(c), 77v(c) and 77x, provide as follows:

Sec. 2. When used in this title, unless the context otherwise requires—

* * * * * * * * *

(4) The term "issuer" means every person who issues or proposes to issue any security; except that with respect to certificates of deposit, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; except that in the case of an unincorporated association which provides by its articles for limited liability of any or all of its members, or in the case of a trust, committee, or other legal entity, the trustees or members thereof shall not be individually liable as issuers of any security issued by the association, trust, committee, or other legal entity; except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is or is to be used; and except that with respect to fractional undivided interests in oil, gas, or

other mineral rights, the term "issuer" means the owner of any such right or of any interest in such right (whether whole or fractional) who creates fractional interests therein for the purpose of public offering.

* * * * * * * * *

(7) The term "interstate commerce" means trade or commerce in securities or any transportation or communication relating thereto among the several States or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia.

(8) The term "registration statement" means the statement provided for in section 6, and includes any amendment thereto and any report, document, or memorandum accompanying such statement or incorporated therein by reference.

* * * * * * * * *

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly con-

trolling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

* * * * * * * * *

Sec. 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

* * * * * * * * *

(10) Any security which is issued in exchange for one or more bona fide outstanding securities, claims or property interests, or partly in such exchange and partly for cash, where the terms and conditions of such issuance and exchange are approved, after a hearing upon the fairness of such terms and conditions at which all persons to whom it is proposed to issue securities in such exchange shall have the right to appear, by any court, or by any official or agency of the United States, or by any State or Territorial banking or insurance commission or other governmental authority expressly authorized by law to grant such approval.

* * * * * * * * *

(11) Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory.

* * * * * * * * *

Sec. 4. The provisions of section 5 shall not apply to any of the following transactions:

(1) Transactions by any person other than an issuer, underwriter, or dealer; transactions by an issuer not involving any public offering; or transactions by a dealer

(including an underwriter no longer acting as an underwriter in respect of the security involved in such transaction), except transactions within one year after the first date upon which the security was bona fide offered to the public by the issuer or by or through an underwriter (excluding in the computation of such year any time during which a stop order issued under section 8 is in effect as to the security), and except transactions as to securities constituting the whole or a part of an unsold allotment to or subscription by such dealer as a participant in the distribution of such securities by the issuer or by or through an underwriter.

* * * * * * * * *

Sec. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Sec. 17. (a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

* * * * * * * * *

(c) The exemptions provided in section 3 shall not apply to the provisions of this section.

* * * * * * * * *

Sec. 22. (c) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause, or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

* * * * * * * * *

Sec. 24. Any person who willfully violates any of the provisions of this title, or the rules and regulations promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this title, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

* * * * * * * * *

Section 269, as amended, of Judicial Code (28 U. S. C. Sec. 391), provides:

All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.

No. 9916

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S CLOSING BRIEF.

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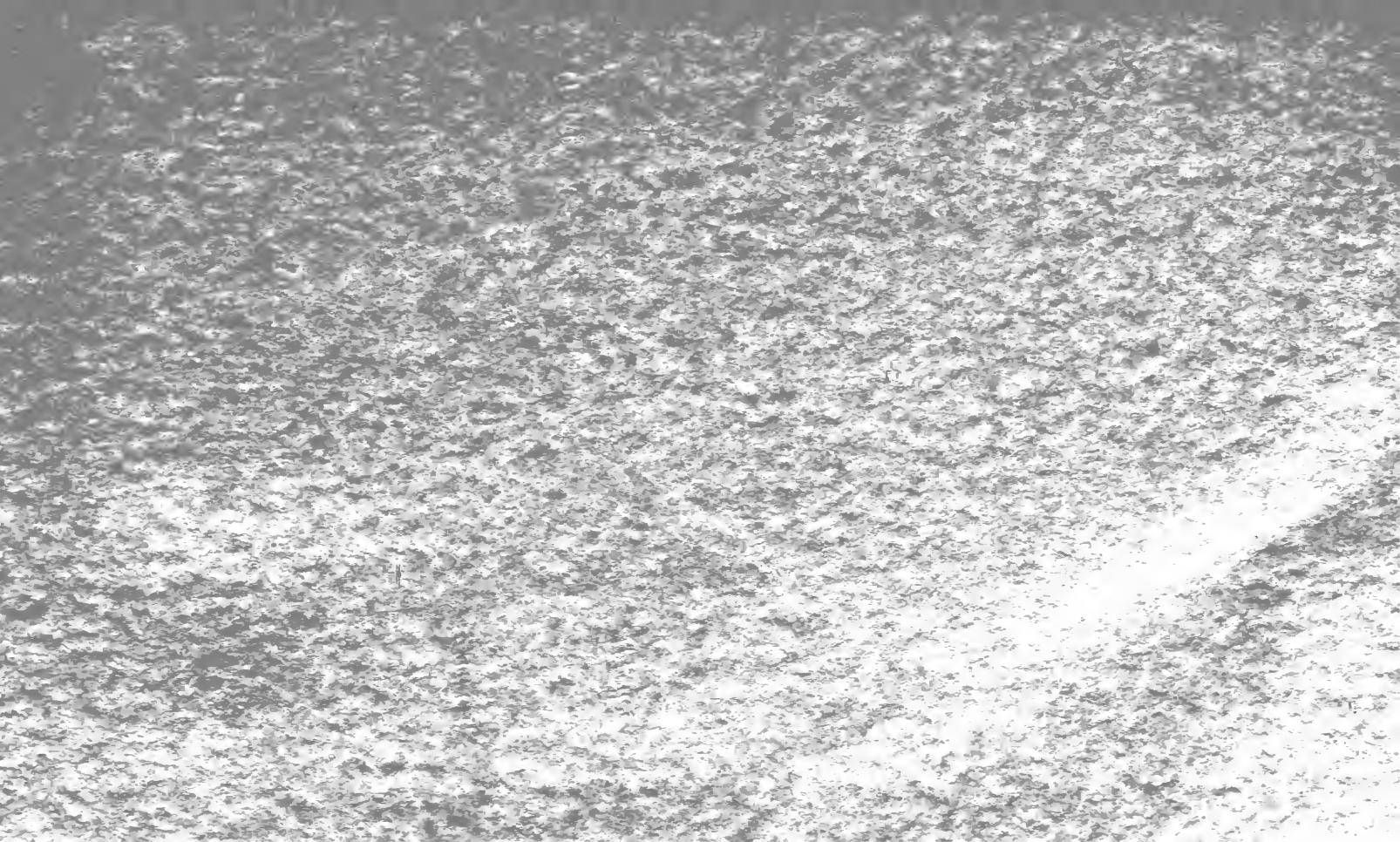

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No. 9916

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APPELLANT'S CLOSING BRIEF.

The brief of appellee has studiously avoided discussing the plain error on the face of the record,—the absence and total insufficiency of the evidence to support the verdict or charge.

By its avoidance of discussion of this error, and its only discussion being that no exception was reserved to the legal sufficiency of the evidence, it implicitly concedes this vital and reversible error.

We pointed out in the opening brief that appellant was convicted of violating the Securities and Exchange Act because it is charged that he mailed or caused to be mailed three stock certificates of a California corporation from one address in Los Angeles, California, to another address in Los Angeles, California.

As stated by Judge Denman in the hearing before the court on the motion to shorten the record:

> "The vital thing in this case is to determine whether this man should go to jail for six months for mailing a stock certificate (of a California corporation) from one place in Los Angeles to another place in Los Angeles."

The learned jurist suggested that a record of five pages could set forth all that is necessary to meet the issue of appeal. Appellant agreed. Appellee required practically all the evidence which voluminously included practically all the matters relating to the mail fraud charges in counts 1 to 13 of the indictment, of which appellant was acquitted. Appellee's statement of facts therefore is so over-complete and inclusive of irrelevant matter relating to counts of which appellant was acquitted as to be misleading to the court, and refers to immaterial and unnecessary matters not within the issues of this appeal.

Appellee says:

> "Appellant cannot here question the sufficiency of the evidence, as no exception was taken, etc." (App. Br. p. 31.)

Where there is such plain error as here, where the only alleged offense is that of mailing a stock certificate of a California corporation from one place in Los Angeles to another place in Los Angeles, and a six months sentence is handed out, the court will correct such an injustice from the plain error on the face of the record, it being evident that the law has not been violated and that Congress never intended that such an act, if proved, comes within the provisions of the statute. By its failure

to argue the merits of the mailing of a letter from one address in Los Angeles to another address in Los Angeles, the appellee inferentially concedes that if the court will consider it, it is reversible error.

As said by Chief Justice Stone in *Brasfield v. United States,* 71 L. Ed. 345:

> "The failure of petitioner's counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. *Cf. Wiborg v. United States,* 163 U. S. 632, 658, *et seq.,* 41 L. ed. 289, 298, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U. S. 207, 220, *et seq.*, 49 L. ed. 726, 731, 25 Sup. Ct. Rep. 429; Crawford v. United States, 212 U. S. 183, 194, 53 L. ed. 465, 470, 29 Sup. Ct. Rep. 260; Weems v. United States, 217 U. S. 349, 362, 54 L. ed. 793, 796, 30 Sup. Ct. Rep. 544, 19 Ann. Cas. 705."

In the case of *Wiborg v. United States,* 41 L. Ed. 289, at 299, the court says:

> "We may properly take notice of what we believe to be a plain error, although not duly excepted to."

And in *Clyatt v. United States,* 49 L. Ed. 732, this court said:

> "While no motion or request was made that the jury be instructed to find for defendant, and although such a motion is a proper method of proceeding, the question whether there is evidence to sustain the verdict, yet Wiborg v. United States, 163 U. S. 632, 658, 41 L. ed. 290, 298, 16 Sup. Ct. Rep. 1127, 1197, justifies us in examining the question in case a plain error has been committed in a matter so vital to the defendant. . . . No matter how

> severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

The appellee, strangely enough, relies in its reply on the fact that defendant was represented in the trial by C. C. Montgomery, Esquire. (App. Br. p. 33.) The answer is contained also in the following words, "appointed by the District Court to represent appellant in the trial in the District Court."

Regardless of who represented appellant in the trial, if plain error exists he should not stand convicted of a crime of which he is innocent nor go to jail for six months because no exception was taken to one error for allegedly mailing a stock certificate from one place in Los Angeles to another place in Los Angeles, especially when the failure to except was not the defendant's failure, as he knows nothing of court procedure, but of counsel who was not of his own choosing.

Appellee concedes that as to Count 16 there was no proof whatsoever of the mailing of the stock certificate. (App. Br. pp. 39-40.) There was no exception taken to even this count, which appellee is willing to concede. This leaves but two counts for consideration.

Incidental *interstate* acts have never been regarded as interstate transportation within the meaning of congressional intent. Thus, in a white slave case the taking

of a girl across state lines in an automobile into another state for a brief visit is not regarded as "interstate transportation" within the meaning of the act forbidding interstate transportation. (*Fisher v. United States,* 266 Fed. 667.)

Likewise in labor relations cases under the Fair Labor Standard Act. the courts have held that the maxim, "*de minimus non curat lex*", should apply. (*N. L. R. B. v. Fainblatt*. 306 U. S. 601, 83 L. Ed. 1014.) See *Schechter Poultry Corp. v. United States,* 295 U. S. 495. In that case it was held that the law applies when there is a stream of interstate commerce and with the regulations of shipments which are continuous and that the law did not apply in such transactions as that of the Schechter Corporation, in whose custody the merchandise came finally to rest.

In the case of *Louis McDaniel and Bernard Silver v. Carl Claven*, Civ. No. 13610, 54 A. C. A. 248, decided by the District Court of Appeal, Second Appellate District of California, the court there held that a person suing for overtime wages under the Fair Labor Standards Act of 1938 on the theory that his erstwhile employer was engaged in *interstate* commerce during the period of plaintiff's employment, could not collect where his employment was entirely within the state, although his employer had incidental shipments from interstate commerce during a period of that time.

To give to the statute the meaning which the appellee wishes to give would be to extend the statute beyond the scope of the congressional intent and invade the field of state control over state corporations, which the statute specifically eliminates. Nor does the *incidental use* of the

mails within the state, by a state corporation, bring the acts within the forbidden portion of the statute.

The Supreme Court of the United States has repeatedly pointed out that under our dual form of government Congress has never intended to invade the field and domain of state control and regulation of its own securities. The purpose of the Act, as set forth in the Act itself, is to provide full and fair disclosure of securities sold in interstate commerce and the mails. Nor can the Securities and Exchange Commission expand its scope and field of activity to invade the state control by judicial fiat.

In *Nat'l. Labor Relations Board v. Fianblatt,* 83 L. Ed. 1018, the court said:

> "The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication."

By express provision the Securities Act of 1933 exempts any security which is a part of an issue sold only to persons resident within a single state or territory, where the issuer of such security is a person resident and doing business within the state.

It is not to be supposed that Congress, in its attempted regulation of securities, intended to invade the domain of the state, nor to apply the law locally to transactions from one place in a city to another place in that city, for to do so would extend the operation of the law to a scope far beyond the ability to carry its operation into effective enforcement, and would make the law applicable

to practically every security no matter how small or unimportant it might be, and regardless of whether the purposes of the Act—to-wit—to provide full and fair disclosure of securities—had been complied with, in the state.

That this was not the congressional intent is further exemplified by the language of the act, which provides that the Commission itself may by its own rules and regulations exempt securities with respect to which it is not necessary *in the public interest* and for the protection of investors *by reason of the small amount involved* or the limited character of the public offering. (Section 3 (11) (b).) This, even if the security is admittedly of an interstate character and extensively sent out through the mail.

The stock of the Consolidated Mines of California was not of such a character, but was a local issue exchanged between Monolith stockholders in California and the company, and the record shows that in only a few instances was there any communication outside of the state.

Appellee says that the case of *Electric Bond and Share Co. v. Securities and Exchange Commission*, 92 Fed. (2d) 580, 586, holds that the incidental mailing of a stock certificate from one state to anothed did not change the intrastate character of a security under the holding company provisions of the Public Utilities Holding Company Act of 1935, because that Act was enacted more than two years after the effective date of the Securities Act of 1933.

Appellee has missed the point of the argument.

By a parity of reasoning we contended that where a company has business which is predominently intrastate,

such as has the Consolidated Mines of California, it need not register, even though it may occasionally make use of the mails and channels of interstate commerce.

If this is true in the case of a holding company, which Congress was very concerned about regulating although there was no express language in the Act, how much more true is it in connection with the Securities Act of 1933 as to the incidental use of the mails from one point in a city to another point in the same city, when the avowed purpose of the Act is to regulate securities in interstate commerce, and where the business is generally and predominently interstate.

Appellee says that the contention that the Corporation Commissioner issued a permit and had control of the securities and all the information which the public desired, was immaterial, and it contends, which we did not, that the issuance of such permit by a state official in fact nullifies the provisions and requirements of federal legislation.

Nothing was farther from our contention than this.

We contended that it was not the intent of Congress, in passing the Securities and Exchange Act, to remove from the state the policing power which the state itself possesses, but to supplement the power of the state where that power was inadequate to provide full and fair disclosure to the public.

The California statute provides that the Consolidated Mines had to secure a permit from the Corporation Commissioner and had to make a full showing that its business would be fair, just and equitable, and that it intended fairly and honestly to transact its business before it could secure a permit. Three permits were issued. It is the

contention of the appellant that where the matters are purely intrastate, or largely so, Congress did not and does not intend to interfere with state control of its corporations.

There is no question about the power of Congress to make provisions with respect to the use of the mails by those conducting *unlawful* enterprises. But it is not here contended, and the evidence disproves that appellant was conducting any *unlawful* enterprise. It is only contended under counts 14, 15 and 16 that he failed to file a registration statement. It is true that the appellee has made a studious effort to retry the appellant before this court on the counts of which he was acquitted, but according to our American system, the acquittal of appellant on these counts vindicates him of conducting any unlawful enterprise. The acquittal covered everything but the three counts, one of which the Government concedes is bad, and leaves only the two counts in question, involving personally owned stock.

We do not contend, as set out in appellee's brief, that Congress is limited in its power to regulate commerce and use the mails. We contend that Congress did not intend to regulate the incidental use of the mails in the transaction of securities of a state corporation within the state, as shown by the facts of this particular case.

The Indictment.

Under point I of its argument appellee says that the indictment states an offense against the laws of the United States. The indictment in this case alleges mailing a certificate of a California corporation from one place in Los Angeles to another place in Los Angeles. On its face, therefore, the indictment does not state an

offense against the laws of the United States, unless the further allegation appearing in the indictment as follows be considered a pleading sufficient to make the offense one within the statute:

> "No registration statement being in effect as to such security, and no exemption from such registration being available."

It is thus apparent that the indictment on its face states no public offense when it charges the appellant with mailing the stock of a California corporation from one place in Los Angeles, California, to another place in Los Angeles, and that the allegation contained in the indictment, above alluded to, which is a pure conclusion of the pleader, sets forth no facts that bring the acts alleged in the indictment within the inhibitions of the statutes. This is particularly true where the facts pleaded on its face contradict the conclusion. The act only provides for registration of securities which are not a part of an issue sold only to persons resident within a single state or territory where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within such state or territory.

Under the act the indictment on its face fails to allege a public offense against the laws of the United States, and the conclusion of the pleader, expressed in the mere generic language of the statute, as to whether there was an exemption from registration could not add anything to the indictment. Under the Act itself no offense would be charged except for this purely generic conclusion of the pleader as the indictment on its face shows an intrastate transaction exempted by the Act itself.

The Act itself also provides that the Commission may provide its own rules and regulations exempting persons from registration. These rules and regulations may change from day to day, and they are peculiarly within the knowledge of the Commission itself. Therefore, in order to apprize an accused of the exact charge he has to meet, he would be entitled to know by a proper allegation whether he was or was not within the exemptions of the rules of the Securities and Exchange Commission.

We do not deem that Congress has intended to abrogate the rules of pleading nor the constitutional guaranties that in a criminal court of the United States an accused is entitled to be informed of the nature and cause of the accusation under the Fifth Amendment to the Constitution, and for that purpose facts must be set out by which he may know of what he is accused and thereby be enabled to prepare his defense.

United States v. Cruikshank, 92 U. S. 542;
Collins v. U. S., 253 Fed. 609 (9th Cir.);
Foster v. U. S., 253 Fed. 481 (9th Cir.);
Bartlett v. U. S., 106 Fed. 884 (9th Cir.);
Salla v. U. S., 104 Fed. 544 (9th Cir.);
Boykin v. U. S., 11 Fed. (2d) 484;
Keck v. U. S., 172 U. S. 434;
Blitz v. U. S., 153 U. S. 308;
Evans v. U. S., 153 U. S. 584.

If an indictment on its face shows that a person may or may not be innocent, the presumption of innocence prevails and the indictment then is insufficient to allege a public offense.

People v. Schmitz, 7 Cal. App. 330;
People v. Davenport, 21 Cal. App. (2d) 292.

Here, the indictment on its face shows acts of innocence and the demurrer should have been sustained.

II.

The Demurrer to the Plea in Abatement Should Have Been Overruled. The District Court Erred in Sustaining It.

The Government contends that the trial court properly sustained the demurrer of the Government to the plea in abatement; that the appellant having been called before an examiner of the Securities and Exchange Commission was granted no immunity as to matters about which he testified.

The record in this case as to the proceedings before the Securities and Exchange Commission shows that appellant appeared, in response to the request, before the examiner, and answered questions. Also that subpoenas were issued [R. 97] for the books and records of the corporation (which the Government now claims was appellant's *alter ego*).

It is correct that appellant was informed by the examiner that what he might say would be used against him, but he was not advised not to answer any questions which would tend to incriminate him or subject him to a penalty or forfeiture. In obeying the mandate of the examiner, the Government claims, therefore, that although he was ordered to appear and did appear in response to the mandate of the examiner, he should have refused to obey the examiner and thus gain a legal point which, by his lawful obedience to proper authority, they now assert he cannot claim. In other words, because he was obedient and dutiful, it is asserted that he had waived his rights. But the order of policeman is a compulsion, even without his putting handcuffs on you. If his siren

blows and you fail to stop your automobile, you are apt to get shot. Does it make a person any less likely to be under compulsion because he voluntarily signs a traffic ticket which the officer writes out for him, than if he stubbornly refuses to do so, asserting that he might incriminate himself? Threats are not all physical, nor procedural. The very request of an examiner to appear is a command which contains compulsion, and it is as much compulsion as the blowing of a traffic signal by a police officer or the sounding of the siren by a traffic officer. The examiner's traffic call is co-equal. Having responded to the compulsion the Constitution guarantees the immunity.

But respondent says that the statute contains the language, "After having claimed his privilege against self-incrimination." This passage, we contend, is unconstitutional, as adding something to the constitutional guaranty. The Constitution itself does not require one to claim one's privilege against self-incrimination. It only provides that a person shall not be compelled, and we respectfully submit that Congress was without authority or jurisdiction to add to the statute a provision requiring a person to claim his privilege against self-incrimination when called before an examiner.

The case cited by respondent, *Vajtauer v. Commissioner of Immigration,* 273 U. S. 103, 113, 47 S. Ct. 302, 71 L. Ed. 560, was an immigration case and not a case of an American subject. It has been repeatedly asserted that while the rights of aliens to a fair trial and hearing are guaranteed by our Constitution and laws, such aliens are in a different position than are citizens under the Fifth Amendment to the Constitution.

Nor is this interpretation applicable to the case at bar where the statute in the Securities and Exchange Act is under attack as violative of the Fifth Amendment to the Constitution of the United States.

Since the decision in the leading case of *Counselman v. Hitchcock,* 142 U. S. 547, 35 L. Ed. 1110, all doubt has been at rest that such a provision as that contained in the instant Act is wholly insufficient to comply with the requirements of the Fifth Amendment to the Federal Constitution.

As to what protection is demanded to comply with the Fifth Amendment, the Supreme Court, in the *Counselman* case, said:

> "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. . . . In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

The Supreme Court of California has construed the language of *Counselman v. Hitchcock* as follows in *In re Critchlow*, 11 Cal. (2d) pp. 755, 756:

> "The history of the origin of the privilege and its adoption in this country as an inviolable right by constitutional enactment has often been stated (Counselman v. Hitchcock, 142 U. S. 547 (12 Sup. Ct. 195, 35 L. Ed. 1110); . . .
>
> "It has never been questioned that, where legislation grants immunity to witnesses in return for

testimony, such testimony ceases to be self-incriminating. But in order that the immunity from prosecution be a substitute for the constitutional privilege it must, in addition to *eradicating* the self-incriminating character of the testimony to be adduced, also *exonerate* the witness from the prosecution for the offense thereby disclosed. The leading case to that effect, followed by the weight of authority in this country, holds that the immunity offered must be coextensive with and a full substitution for the constitutional prohibition. (Counselman v. Hitchcock, *supra,* followed in *In re* Doyle, *supra, Ex parte* Cohen, *supra,* and numerous other cases.) As said in *In re* Doyle, *supra* 257 N. Y. 244 (177 N. E. 489, 87 A. L. R. 418)) 'To force disclosure from unwilling lips, the immunity must be so broad that the risk of prosecution is ended altogether.' "

The Securities and Exchange Act in so far as it adds to the Constitution and requires one to claim his privilege before the Commission, even though compelled to testify, adds to the Fifth Amendment and is violative thereof.

The Transactions Involved in Counts 14, 15 and 16 Are Exempt From Section 5(a).

The appellee makes an ingenious argument against the contention of appellant that the stock certificates involved in counts 14, 15 and 16 were exempt because issued from Certificate No. 716 which, prior to reissue, has been registered and issued to McKiver, and thereafter reissued to Tyler.

However, there are several weak or void spots in its course of logic.

The first one, which is at once apparent, is that appellee leaves the reissue to McKiver out of the picture and ignores that transaction in the chain of title. Another vice and fatal weakness is the assumption of vital facts without the citation of any evidence or proof to sustain them,—which necessary evidence does not, in fact exist.

Appellee begins by disavowing the testimony of its own witness, accountant Jacobson. It is said that Jacobson's testimony that the stock involved in these counts was "private stock" is a conclusion and "could be properly stricken from the record.

Appellant does not concede that this conclusion is of a character which could be properly stricken, or that it is objectionable at all, since it was given upon a matter and by a witness properly qualified to testify to such conclusion.

However, appellant hereby makes a binding offer which will stand until this matter is submitted. He offers to have this conclusion stricken from the record and disregarded if the Government will agree that all conclusions of this witness be stricken.

We apprehend that no case was ever tried in which the evidence of the prosecutor was more nearly one continuing and complete mass of conclusions of witnesses than this case. Eliminate the conclusions of Government witnesses and there would be no case. Our offer stands as above set forth.

However, Jacobson was an expert accountant and the matters as to which he testified involved an examination of a long and involved account, including many books and records. It hardly requires citation of authorities to up-

hold the proposition that such a witness testifying under these conditions may give conclusions.

Again, the conclusion in this instance, was fully supported by Jacobson's detailed statement of the facts on which it was based. Hence the conclusion was admissible and competent.

The Government called Mr. Jacobson as its witness and immediately qualified him as an expert [R. 271]. It further qualified him by showing that he had set up the bookkeeping system and the books of Consolidated Mines; had made the entries in them over a period of several years; especially, he had written up or supervised the writing of the stock certificate journal, and had checked, as well as supervised, the work of Miss Stroatman, who made the entries which the witness did not make himself [R. 285].

It is safe to say that Jacobson's testimony, given on direct examination, is ninety per cent his conclusions, based upon his knowledge of the books and records. Also it is certain that without this testimony of Jacobson's the Government would not have the semblance of a case.

From all of which considerations respondent cannot well be heard to claim that their expert's testimony by which he not only gave conclusions, but also traced the certificate involved in counts 14, 15 and 16, is not competent.

The Issue of Personally Owned Stock Being Exempt.

Apparently, grasping at straws, appellee urges that the "burden of proof was upon appellant to establish an exemption from the provisions of section 5(a)(2) of the Securities Act of 1933." This is one of his major arguments and rates a caption on page 33 of appellee's brief.

To successfully meet and shoulder this burden was as easy a task as a litigant ever encountered. It was only necessary to cross-examine the Government's own expert witness whose testimony was the only evidence submitted which bears on this issue, and is therefore, uncontradicted. Jacobson's testimony is quoted and apparently accepted it as final, since no attempt was made to have him qualify it.

The Merits of the Issue.

On the merits appellee assumes and argues that because Consolidated Mines Company of California was the *alter ego* of appellant, and Tyler was employed by appellant, and both participated in the distribution of the stock of the corporation, *Tyler could not have any transaction, however small or private, having to do with stock of the corporation, and no matter whether it was originally issued entirely independently of and unconnected with the alleged activities of said parties in the solicitation of exchange of stocks of which complaint is made, without violating the Act.*

Appellee cites no authority which so holds, and it is clear that such a decision would judicially add language to section 77(a) and section 4(1) of the Act, which added language would be in effect as follows, "except that a transaction of such other person shall not be exempt if such person has been or is an issuer, underwriter or dealer of or in certificates of stock of the same corporation, other than those involved in said transaction, and except that, even though no public offering is involved in such transaction, if other stock of the same corporation has been or is publicly offered by the issuer, this exemption does not apply."

In other words, the section herein involved would have to be rewritten so that the word "transaction" would be deleted therefrom.

As it now reads, certain *transactions* are exempt, which *transactions* are those wherein certificates of stock are transferred by one who is not the issuer, underwriter or dealer of or in *said particular certificates;* and *transactions* in which the stock involved has not been offered publicly. As the section now reads it is of no moment that other stock issues have been included in a public offering, or that the person engaged in the transaction may have been an issuer, underwriter or dealer in other stock through some other transaction. If, in the transaction as to which exemption is claimed, the stock is personally owned and no public offering has occurred, the exemption protects the owner. He can deal with such stock privately and to do so is not required to comply with the registration provision of section 5(a).

The case of *Landay v. United States,* 108 Fed. (2d) 698, 704, relied upon by appellee, is not at all in point. There the certificates involved were an original issue of R. Cummins & Company, Inc., which the defendants formed in pursuance of their general scheme and which they absolutely controlled. The Court held that since the defendants dominated the corporation they were responsible for its acts. After quoting an excerpt from the *Landay* case, appellee's brief asserts, page 35:

> "Appellant, however, seeks to construe section 4(1) of the Act as though it exempted from the provisions of section 5(a) *all activities of any person other than an issuer, underwriter, or dealer.*" (Emphasis added.)

Appellee has failed to grasp the issue. No such claim was made in appellant's opening brief. That contention would be irrelevant to any issue presented on this appeal.

Appellant's contention has been and is as above stated. Appellant is not seeking exemption for acts of the corporation concerning these transactions. The corporation as an entity had no interest in these transactions, and did no act except the ministerial one of issuing stock as required by Tyler to Regina Woodruff, Eva Goodrich and Dr. Arnold.

There is not a word of evidence in the record to form a factual basis for appellee's assumption that either appellant or the corporation profited in any way in these transactions.

The McKiver stock was not mentioned in or covered by the partnership agreement dated July 1, 1935, which Tyler executed and by which he agreed to assign an interest in 40% of the stock of the corporation to Shaw (p. 317). The McKiver stock came to him through authorization of the corporation permit No. 3, which also authorized the issuance of the stock covered by the partnership agreement to be issued to Tyler under the conditions therein named (p. 283). But Tyler had no interest in McKiver's stock and purchased as a private transaction from McKiver, as shown in appellant's opening brief.

Our search of the transcript fails to discover any mention of the Woodruff, Goodrich and Arnold transactions, except the bare stock certificate transfers.

The issue to McKiver was an original issue from the corporation, but the corporation was not the issuer in the transaction between McKiver and Tyler, nor in those by

which Tyler passed title to Woodruff, Goodrich and Dr. Arnold.

But appellee contends that "Tyler, dominated and controlled by Shaw, purchased from the issuer with a view to distribution."

Now, this is a statement which anyone can make, but without *some* evidence to support it, this Court will hardly accept the mere assertion as sufficient to establish a fact, and an element essential of the definition of the term "underwriter," without which the Government's case must fail.

In fairness it should be recognized that this theory which ends with the conclusion that Tyler and Shaw, or both, were underwriters, is not pressed with much assurance by appellee. Its major contention is that appellant was an underwriter in these transactions under section 2(11), it being contended that these defendants sold "for an issuer in connection with the distribution"; to complete this line of reasoning, and as a basis for it, appellee says, page 37, "the record is clear that at least a portion of the money received by appellant from the sales of the Consolidated Mines of California stock was in fact used by the corporation."

From this irrelevant generality appellee goes on to argue and cite authorities as though he were attempting to uphold the Government's charges on which appellant was acquitted. Appellee has not pointed out, and it cannot name a single fact or circumstance from which it can be inferred that Tyler purchased from McKiver "with a view to distribution." On the other hand, Tyler secured the stock from McKiver in February, 1936, and held it more than a year before selling any portion of it. The

transaction with Woodruff was on May 13, 1937 (p. 343) and that with Goodrich was August 26, 1937 (p. 344).

The records show that during this period many transactions were completed involving exchanges of corporation issued stock, and if Tyler had desired to dispose of his privately owned stock he surely could have done so.

Again, there is no evidence whatever to support the assertion that Tyler was "dominated and controlled" by Shaw in any respect. Their only relations were through the partnership agreement and the employment of Tyler by Shaw for a limited time, neither of which encompass the private transactions of Tyler, either as to matters unconnected with the corporation or any which might be so connected, otherwise than through said relationship.

In the days of slavery black men were personally "dominated and controlled" by their masters, but in the absence of proof of such personal domination through force, fear, fraud, etc., a court will hardly hold that contractual domination, in any case, has involved a proprietary control over the inferior's private transactions.

Securities and Exchange Com. v. Chinese Cons. Benevolent Ass'n, 120 Fed. (2d) 738, has no bearing on the question really involved herein. The Association engaged in selling Chinese government bonds. It was held that section 4(1) of the Act was violated in that the Association was selling "with a view to" their distribution, which perfectly complies with the definition of an "underwriter" set forth in the section last named. Appellee fails to point out any fact or situation shown by the evidence *pertaining to counts 14, 15 or 16* which bears the slightest similarity to those in the *Chinese Association* case.

Correction of Error.

Appellee errs in asserting that appellant states, "There was no public offering *of the stock of Consolidated Mines of California.* (Emphasis added.) In fact, this is a clear misstatement. The emphasized language is not within the statement in the opening brief which appellee purports to quote.

Appellant's brief, p. 41, uses the subhead, "Nor Was There A Public Offering," in a thesis in which the certificates involved in counts 14, 15 and 16, and no others, were discussed. We said, and repeat, that there was no public offering of that particular stock, but appellant did not say, and had no occasion to even consider, whether there had been a public offering of *other stock than that acquired by the McKiver issues of stock* and sold to the persons named in said counts.

Appellee apparently studiously avoids discussing the origin of the very stock certificates involved in its charges. It refuses to discuss these particular transactions. That is its privilege but it should not warp appellant's language so that it, also, would become irrelevant to the issues herein.

The decision in *Securities and Ex. Com. v. Sunbeam, etc. Co.*, 95 Fed. (2d) 699, is not in point. The court of appeals said that the district court denied an injunction sought by the Commission because it concluded (p. 700):

> "The transaction by the defendants herein being solely with the stockholders of Sunbeam Gold Mines Company and Golden West Consolidated Mines, all of said stockholders being stockholders of respondent company through merger of said corporations do not, irrespective of the number of said stockholders,

involve a public offering within the meaning of section 4(1) of the Securities Act of 1933, as amended, and the plaintiff's application for preliminary injunction is therefore denied."

This was the sole issue. It was further said (p. 702):

"These Reports clearly demonstrate that the Congress did not intend the term 'public offering' to mean an offering to any and all members of the public who cared to avail themselves of the offer, and that an offering to stockholders, other than a very small number, was a public offering. . . .

"We therefore hold that an offering of securities under the Securities Act of 1933 may be a public offering though confined to stockholders of an offering company, *a fortiori* where the offerees include the stockholders of another company, though seeking to become stockholders of the offeror."

But the McKiver stock issue was not offered to any and all Monolith stockholders. As far as the record shows none of that issue was offered to anyone except those persons named in counts 14, 15 and 16.

The reply brief fails to point out a single iota of evidence which tends in any degree to show that appellant received any profit or money from the Goodrich transaction, the Woodruff transaction, or the Dr. Arnold exchange and sale. No attempt is made to show that appellant or Tyler gave any portion of the proceeds in money or property to the corporation which Tyler, alone, received in these dealings.

Appellee forgets, or ignores the fact that the issues herein involved concern counts 14, 15 and 16, alone; that it is wholly irrelevant to say, even if it were true, that

money received through the distribution of corporation owned stock pursuant to a general scheme and plan, was given to the corporation. This has nothing to do with a transaction entirely independent of said plan and in which no corporation owned stock was involved.

Appellee's brief, page 36, appropriately quotes from the House Report, 73rd Congress, that section 4(1) of the Act is in the main, concerned with the problem of distribution as distinguished from trading. In the instant case, in respect to counts 14, 15 and 16, the Commission's entire concern is trading, and the element of distribution is almost negligible.

Throughout the argument of the question which pertains to the McKiver issue of stock the appellee's brief never attempts to controvert the issue presented by appellant's opening brief, because appellee persists in ignoring the word "transactions" in section 4 and section 4(1).

Section 4 reads: "The provisions of section 5 shall not apply to any of the following *transactions:*

Subdivision (1) enumerates: "*Transactions* by any person other than the issuer; *transactions* by an issuer not involving any public offering; or *transactions* by a dealer (including an underwriter no longer acting as an underwriter, etc.)." (Italics added.)

While treating section 4 and 4(1) as though the word "transactions" had been deleted, appellee would read into them, as a substitute therefor, a provision which would nullify their effect if "such person" had been an issuer, underwriter or dealer in an original issue of corporate stock of the same corporation, or had offered such original issue to the public.

Appellant contends that since Congress intended to solve the problem of distribution of securities its concern necessarily was centered on original issues of stock by corporations by which the general public might be deceived and defrauded, and not single transactions involving only a division and reissue of a certificate privately owned, which cannot aid appreciably to the problem of distribution.

The Res Judicata Issue.

Appellee contends that the decision of *Consolidated Mines of Calif. et al. v. Securities and Exchange Com.*, 97 Fed. (2d) 704, is not the "law of the case" in this prosecution, because, it is said appellant was not a party to the former matter and "was not a director nor an officer of Consolidated Mines of California."

In that behalf it has been contended by the Government throughout the instant case, and still is, as evidenced by other portions of its brief herein, that William Jackson Shaw so completely controlled Consolidated Mines of California that it was his *alter ego;* also, it is appellee's theory that appellant dominated the every act of Tyler, who was a party to and an appellant in the former appeal.

The law of the case rule is not limited to the identical parties to a proceeding but includes those in privity with the parties, and privity denotes mutual as well as successive relationship,—such as the privity between trustee and *cestui que trust.* (*Pond v. Pond's Estate*, 65 A. 97, 97 Vt. 352, 8 L. R. A. (U. S.) 212.)

Appellee says that the entire record must be considered upon this appeal. That is to say, appellee is asking this

court to consider a mass of irrelevant matters which pertain only to charges upon which appellant was acquitted.

"The complete picture" which appellee therefore seeks to present is one that refers to matters that should properly not be here by reason of the acquittal of the appellant, and matters which, if the indictment had been on counts 14, 15 and 16 alone would never have been properly permitted to be introduced in evidence.

It is respectfully submitted, therefore, that the court will in its wisdom disregard these matters and will only decide whether the appellant violated the law in any respect and consider only evidence which is competent for the purpose of establishing or failing to establish whether the appellant caused three stock certificates to be mailed from one place in Los Angeles to another place in Los Angeles, and whether that constituted, under the competent evidence in this case, a violation of the Act; also, the evidence pertaining to the fact that the certificates were from the McKiver issue and the stock was not from a corporate issue.

For each and all of these reasons, as well as the other matters presented in the opening brief, it is respectfully prayed that the judgments be reversed.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

No. 9916.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JACKSON SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee-Petitioner.

PETITION FOR REHEARING.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

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PETITION FOR REHEARING.

To the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit:

United States of America, appellee and petitioner herein, respectfully prays that, for the reasons hereinafter set forth, it be granted a rehearing of the decision rendered October 26, 1942. The opinion is by Judge Denman, concurred in by Judge Stephens. There is an opinion by Judge Mathews, dissenting in part from the majority opinion.

Grounds Upon Which Rehearing Is Asked.

This case first came before the Court upon an appeal from a judgment of the District Court of the United States for the Southern District of California, Central Division, convicting the appellant, Shaw, of causing to be carried through the mails unregistered corporate securities in

violation of the Securities Act of 1933. As to counts Nos. 14 and 15 of the indictment upon which Shaw was convicted, this Court reversed the judgment because the District Court instructed the jury as follows:

> "The burden of showing an exemption from registration, if exemption is claimed, rests on the defendant. The fact that the stock sold was or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned."

This Court took the position in its opinion that the question of the personal ownership of the stock by one McKiver and one Tyler was material to the issue of whether an exemption from registration was available in this case, and that the trial court's ruling to the contrary required a reversal of the judgment below.

Petitioner respectfully submits that this Court erred in so holding, and that the trial court's instruction was proper. Furthermore, in reaching its conclusion and setting forth its holding this Court incorrectly interpreted Sections 2(11), 2(12), 3(a) (10) and 4(1) of the Securities Act of 1933.

We seek in this petition to clarify certain aspects of this case and various provisions of the Securities Act in order to make apparent the correctness of the trial court's instruction and to point out to the Court the erroneous and misleading interpretations given the Act in the Opinion. It is our considered opinion that, if permitted to stand, the decision will constitute a definite invitation for evasion of the registration requirements of the Act, and will seriously jeopardize and hamper effective administration of the Act by the Securities and Exchange Commission in accordance with the mandate of Congress.

I.

The Lower Court Did Not Err in Charging the Jury That it Was Immaterial Under the Federal Securities Act Whether or Not the Stock Sold Was "Personally Owned".

1. Generally speaking, the Securities Act of 1933 requires that all securities offered for sale, sold, or delivered after sale through the mails or in interstate commerce must first be registered with the Securities and Exchange Commission unless an exemption from registration is available. Section 5(a) (2) of the Act, which Shaw was convicted of violating, makes it unlawful, in the absence of an exemption, "for any person, directly or indirectly . . . to carry or cause to be carried through the mails . . . any . . . security for the purpose of sale or for delivery after sale" unless such security is registered with the Commission. Exemptions covering certain classes of securities are set forth in Section 3 of the Act and the exemptions covering certain classes of transactions are contained in Section 4 of the Act. The only exempting provisions which merit any consideration in this case are Sections 3(a) (10) and 4(1). Sections 2(11) and 2(12) merely define and do not exempt. They are important in construing and applying Section 4(1).

2. As stated in the Court's opinion (p. 4), admittedly the burden to show an exemption from registration was upon appellant. There is thus no question but that the lower court was correct in charging that "the burden of showing an exemption from registration, if exemption is claimed, rests on the defendant."

3. This Court has held that the lower court erred in telling the jury that "The fact that the stock sold was

or was not personally owned stock is immaterial so far as the Federal Securities Act is concerned."

The question whether McKiver or Tyler "personally owned" the stock sold in this case can be material, as this Court has held it to be, only if this question is relevant to the issue whether or not an exemption from registration exists under the facts in this case. But nowhere in the exempting provisions, Sections 3 and 4, or in any other part of the Act (including Section 2(11)) is any exemption given to "personally owned stock" or, indeed, is the phrase mentioned at all. Unless the proof in this case as to "personal ownership" provided a material basis for finding that one of said exemptions was available, there would be no justification for this Court's conclusion that the trial court committed reversible error in its instruction regarding the question of personal ownership of the stock.

This Court, in holding the charge improper, has suggested that the jury might have disbelieved the evidence that Tyler was acting for Shaw or the corporation; and hence, if the jury had been permitted to find personal ownership in Tyler, it could have found that an exemption existed with respect to the stock in question, and acquitted Shaw. But this argument presupposes two things: (1) that there is evidence in the record from which the jury would have been entitled to find that Tyler owned the shares personally, and (2) that such ownership would preclude Tyler from being an "underwriter" within the meaning of Sections 4(1) and 2(11). Neither of these suppositions is valid.

It is clear the record would not have justified a finding by the jury that Tyler owned the shares personally. Rather, the evidence overwhelmingly establishes that Tyler took the stock from McKiver for Shaw's account and for the account of the corporation.

Appellant relies on testimony that some of the stock, which was originaly issued by the corporation to McKiver for his mining claims, was transferred on the books of the corporation from McKiver to Tyler. This testimony came from one Louis R. Jacobson, an accountant, who characterized this stock as "private." This is a mere conclusion. Jacobson also said that certain of the proceeds came from the sale of the "private stock." Obviously, Jacobson was testifying only from the standpoint of proper application of accounting principles [CF. R. 519]. Certainly this evidence of Jacobson provided no substantial basis for a finding that Tyler acquired personal ownership of the stock. Patently, the trial court's instruction could not have been prejudicial to the appellant when the record was so barren of any evidence tending to establish that Tyler "personally owned" the stock, and so replete with evidence that the stock was received by Tyler for appellant Shaw and the corporation.

The second supposition in the opinion is that proof of ownership in Tyler would preclude him from being an "underwriter" within the meaning of Sections 4(1) and 2(11) of the Act. The invalidity of this supposition involves a discussion of this Court's misinterpretations of those sections, and, in order to avoid repetition, will be discussed in the point immediately following.

II.

The Decision Misinterprets and Improperly Applies Sections 4(1) and 2 (11) of the Securities Act.

1. Section 4(1) of the Securities Act provides, in pertinent part, that "The provisions of Section 5 shall not apply to any of the following transactions: (1) Transactions by any person other than an issuer, underwriter, or dealer . . ." As the Court recognized in its opinion, unless Shaw could prove to the satisfaction of the jury that Tyler was not an "underwriter" within the meaning of the Securities Act, there was no possibility of claiming an exemption under the foregoing provision of Section 4(1), for Shaw dominated both Tyler and the corporation and was properly convicted if Tyler was an "underwriter."

Since there is nothing in Section 4(1) indicating an exemption in the case of "personally owned" stock, the only possible source of justification for the view of this Court is Section 2(11) which defines "underwriter." But neither is there reference to personal ownership here. Section 2(11) simply defines an underwriter to be "any person" who (a) "has purchased from an issuer with a view to . . . the distribution of any security"; *or* (b) "sells for an issuer in connection with the distribution of any security"; *or* (c) "participates or has a direct or indirect participation in any such undertaking"; *or* (d) "participates or has a participation in the direct or indirect underwriting of any such undertaking." In addition, the last sentence of Section 2(11) has the effect of broadening the definition of "underwriter" to include a person who purchases from or sells for a person (like Shaw) who controls the issuer.

2. In view of these provisions it is clear that evidence of private ownership does not preclude a finding that appellant and Tyler were underwriters. The evidence* before the jury at the time of the trial court's charge conclusively established that the appellant, Shaw, dominated the corporation and controlled Tyler in these transactions; that the sales in question were part of a wide spread public distribution of stock for the benefit of Shaw and the corporation; that Shaw and Tyler actively participated in this distribution; that Shaw and Tyler were therefore "underwriters" within the meaning of Sections 4(1) and 2(11); and that an exemption from the registration requirements was thus unavailable to the appellant and Tyler.

Most of the proceeds of the sales ultimately went to Shaw. The corporation received a portion of the proceeds. The evidence abundantly establishes that all of the shares, including the stock involved in Counts 14 and 15, were sold for Shaw and the corporation, each being an "issuer" for the purpose of determining whether Tyler was an underwriter. It is respectfully submitted that this evidence conclusively establishes that Tyler, as well as appellant, was a person who, within the meaning of Section 2(11), "sells for an issuer in connection with the distribution of any security"; that each was a person "who participates or has a direct or indirect participation in any such undertaking"; that each was a person who "participates or has a participation in the direct or indirect

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*A summary of the evidence relating to the distribution of stock of the corporation and the participation of Tyler and Shaw in such distribution, is set forth in Appendix "A" hereof.

underwriting of any such undertaking"; and that each was therefore an "underwriter" within the meaning of Sections 4(1) and 2(11) of the Act.

In the face of such overwhelming evidence establishing the fact that Tyler and Shaw were underwriters and that the exemption of the first clause of Section 4(1) was unavailable, the instruction that the factor of personal ownership was immaterial could not, in any event, be prejudicial.

3. The Court misinterpreted and improperly applied Sections 4(1) and 2(11) when it stated in its opinion as follows:

> "In this situation (a) if McKiver acquired personal ownership with no intent to transfer the shares when he acquired them, a subsequent transfer to Tyler would not be a transfer from an underwriter, and Tyler would hold them and sell and mail them other than an underwriter; or (b) if McKiver intended to acquire the shares for the purpose of transferring them, he acquired them as an underwriter, in which situation Tyler did not acquire or hold them as an underwriter and hence sold and sent them through the mails 'other than [as] an underwriter.'
> * * *
>
> "Whether or not Tyler acquired the shares from the corporation, the issuer, through McKiver, its agent, as in situation (c), or from McKiver as personally owning them either freely in situation (a) or as underwriter and hence in situation (b), de-

pends upon whether McKiver personally owned the stock or was merely an agent for an undisclosed principal. The jury might have made the inferences, from the evidence of witnesses believed or disbelieved, supporting any one of the three situations. Only if it made the inference (c) did the question of personal ownership, eliminated by the district court's instruction, become immaterial. The court's instruction prevented the jury from considering the evidence with a view to situations (a) and (b). (Page 5.)

"If the jury had not been improperly instructed that it could not consider either McKiver's or Tyler's personal ownership, they well may have found that the sale and mailing transaction by Tyler was one of his own stock and not a transaction by him as an underwriter of stock passing through him from Shaw as an issuer in the limited sense of section 2(11).

"The instruction respecting the immateriality of personal ownership was error and requires a reversal and a new trial." (Pages 6-7.)

The opinion was incorrect in the following respects:

A. McKiver's intent with reference to transferring the shares and his acquisition of personal ownership are not material in determining whether or not Tyler was an underwriter. It is the intention and position of Tyler in this situation that is determinative. Did Tyler actually sell for the corporation or for Shaw (the issuers under Section 2(11) in connection with the distribution of the security) or did he sell for his own account? That

is the question. Tyler's intent is relevant to this question, but McKiver's is not. It is clear that Tyler could be (and was) an "underwriter" in this situation, even if McKiver originally acquired personal ownership of the stock, and even if McKiver was not an underwriter. Under Section 2(11) a transferee who sells a security may be an underwriter, despite the fact that his transferor, who had originally acquired the security from the issuer, was not an underwriter. This Court therefore erred in holding that the personal ownership and intent of McKiver were material factors.

B. In stating the converse situation, this Court has erred in saying that if McKiver was an underwriter, Tyler could not be. The term "underwriter" is defined in Section 2(11) of the Act to include sub-underwriters, in fact, all persons who participate, directly or indirectly, in the sale of securities for an issuer in connection with the distribution of the security, or who participate in the underwriting of any such undertaking. Section 2(11) defines "underwriter" as "*any* person" who does the things specified in that section. This clearly means any one person or any number of persons, acting separately or in concert. Thus, the mere fact that McKiver might have been an underwriter, would not preclude Tyler from also being an underwriter, and it cannot be properly concluded that a subsequent sale by or through Tyler was "other than [as] an underwriter."

C. In determining whether Tyler was an underwriter under Sections 4(1) and 2(11) of the Act, it is wholly irrelevant and immaterial whether or not he "personally owned" the stock he sold. Proof of personal ownership of the stock in Tyler would not justify a finding that he was not selling the stock for an issuer.

Indeed, in the typical underwriting situation, the underwriter buys and owns, in whole or in part, the stock being offered. So, too, a participant in an underwriting usually sells stock which was initially sold by the issuer to the underwriter and was thus initially owned by such underwriter.

The jury would have been justified in finding Tyler not to be an "underwriter," only if it found that he was not one who "sells for an issuer in connection with the distribution of any security." Whether or not legal title to the shares was transferred to Tyler, he could still have sold for Shaw and the corporation. The question was therefore not one of personal ownership of the stock, but rather of his intent when selling, and of his relationship and understanding, if any, with the issuers in connection with his selling activities. The burden was upon Shaw to prove that Tyler *intended* to sell for his account only. This burden obviously was not met. Rather, the evidence clearly established a contrary intent. Therefore, the charge given by the trial court was correct and did not prejudice appellant.

III.

The Decision Misinterprets and Improperly Applies Section 3 (a) (10) of the Securities Act.

The opinion states that the question of personal ownership of the stock by Tyler was "clearly in issue" with reference to the exemption afforded by Section 3(a) (10) of the Act. This section exempts certain classes of securities from the registration requirements of the Act. The opinion of this Court concludes that a Section 3(a) (10) exemption applied to the stock in McKiver's hands, and that the registration requirements would "reapply only if McKiver transferred them back to the corporation for reissue."

1. In the first place, we submit that this Court incorrectly ruled that the record could substantiate a finding that the requirements of Section 3(a) (10) were met in connection with the issuance of the stock to McKiver. This section permits the exemption only when the securities are issued "after a hearing upon the fairness of the issuance . . ." before an appropriate governmental agency. This Court infers from the existence of a permit issued by the California Corporation Commission that it was issued after a hearing before that Commission. This inference was not permissible. The pertinent provision of the California laws (General Laws of California, Vol. 1, Act 3814, Sec. 4) is divided in two parts. The first paragraph does not require a hearing and, hence, permits the issuance of a permit without a hearing. It is only in the second paragraph dealing with "replacement securities" that there is provision for hearing. Indeed, appellant contended in his opening brief (pp. 2-4) that the permit in question was issued pursuant to the first

paragraph. Consequently, it was not permissible to infer from the mere existence of a permit that there had been a hearing. Moreover, there was no evidence in the record to show that such a hearing was had. In the absence of such a hearing, there could not be any exemption under Section 3(a) (10). Consequently, it was incorrect for this Court to conclude that the stock issued to McKiver was exempt from registration by reason of Section 3(a) (10).

2. Furthermore, this Court incorrectly held that the registration requirements would not apply unless the McKiver stock were returned to the corporation and reissued. As we have shown, the evidence is overwhelming that Tyler sold this stock for Shaw and for the corporation. Obviously, Tyler could do this without having the stock returned to the corporation and reissued. Since he sold the stock for an issuer, he was an underwriter and subject to the registration requirements of the Act. To say that a transferee of stock issued pursuant to a Section 3(a) (10) exemption could sell such unregistered securities for the issuer in connection with a public distribution of the securities would make it a simple matter to evade the registration requirements of the Act. Under this Court's ruling, any promoter desiring to escape the disclosure requirements of the Federal Securities Act could simply obtain a State permit, after hearing, and then proceed to make a general distribution to the investing public. It is submitted that the Act does not permit a construction which would allow such obvious evasion.

Since there is no evidence in the record that would permit a finding that the Section 3(a) (10) exemption applied to the stock when it was issued to McKiver, since

in any event that exemption would not apply to Tyler, and since there is no evidence upon which the jury could have predicated a finding that Tyler was *not* selling for the issuer, the question of personal ownership was immaterial and the trial court's charge was correct and could not possibly have prejudiced appellant.

3. Although it does not appear necessary to the decision, it should be noted that the opinion incorrectly interprets Section 2(12) of the Act. It is stated in the opinion that Tyler could not be a dealer within the meaning of that section, if he was "dealing with his personally owned stock," since such stock would not be issued by another person "as required to constitute him a dealer." Section 2(12) provides:

> "The term 'dealer' means any person who engages either for all or part of his time, directly or indirectly, as agent, broker, or principal, in the business of offering, buying, selling, or otherwise dealing or trading in securities issued by another person."

Obviously this section defines a dealer in terms of the business that he does, rather than in terms of a particular transaction in securities. Personal ownership does not negative the fact that the stock is issued by another person, *viz.*, the corporation. A person engaged in the business of buying and selling securities very frequently acquires title to the securities. That does not make him any less a dealer in securities issued by another "person," which term is defined to include corporations (Section 2(2)).

Wherefore, appellee, petitioner herein, respectfully submits that its petition for rehearing should be granted.

Respectfully,

LEO V. SILVERSTEIN,
United States Attorney,

MAURICE NORCOP,
Asst. United States Attorney,
Attorneys for Appellee-Petitioner.

Of Counsel:
JAMES M. EVANS
JOHN G. SOBIESKI
HOWARD A. JUDY
Attorneys, Securities and Exchange Commission.

Certificate of Counsel.

I, Leo V. Silverstein, one of the attorneys for appellee and petitioner in the above entitled cause, hereby certify that the foregoing petition for a rehearing is, in my judgment, meritorious and that said petition is presented in good faith and not for purposes of delay.

LEO V. SILVERSTEIN,
Counsel for Appellee.

APPENDIX "A."

Summary of Testimony as to the Distribution of Stock of Consolidated Mines of California and the Participation of Frank S. Tyler and Appellant in Such Distribution.

Tyler was employed by appellant, his brother-in-law, in the fall of 1933 [R. 478]. Thereafter, they prepared or caused to be prepared what was known as the Frank S. Tyler Partnership Agreement, dated February 6, 1934 [R. 482]. Shareholders of Monolith companies were solicited to exchange their Monolith holdings, or to turn in their shares at an agreed valuation, and were later to receive stock in a mining company to be formed. The shareholders of the Monolith companies would sign the Tyler Agreement and deliver their shares, and sometimes cash, to the solicitors [R. 141, 142, 143].

Consolidated Mines of California was incorporated on September 19, 1934 [R. 483]. Its stock was exchanged for Monolith stock and sold for cash, generally at a valuation or price of $2.00 per share [R. 196, 338].

Investor witnesses testified in part as follows:

James Kruse—San Francisco [R. 488-500].

He was first approached by salesman Alexander early in 1934, and a few months thereafter by Tyler. He was solicited by Tyler and appellant and was in communication with them from 1934 until March 8, 1937. He surrendered his Monolith holdings, signing the partnership agreement, and thereafter purchased, for cash, additional Consolidated Mines stock. His investments totaled 1500 shares of stock of Consolidated Mines of California.

Marie M. D. Craig—Fresno County [R. 192-201].

She testified [R. 194], "The following year, early in 1935, Mr. Tyler and Mr. Alexander came to our ranch. * * * I exchanged all my shares of Monolith and Midwest for the gold mining shares. I think it was 806 gold mining shares I got in exchange."

She received a letter [R. 198] dated July 1, 1937, signed by Tyler, advising her of conditions at the mine.

Garfield Voget—Hubbard, Oregon [R. 162-184].

He was called upon by salesman Alexander in 1934 and solicited to surrender his Monolith holdings and to sign the Tyler Partnership Agreement. He thereafter "paid in $200 to the Tyler agreement" [R. 163].

He testified [R. 170],

> "I believe I got a letter from Mr. Tyler to exchange my Midwest stock for Consolidated. Either that or he called me up. I know Mr. Tyler called me up over long distance, and wanted me to exchange, and said that this was about my last opportunity to exchange my Midwest Portland Cement stock for Consolidated Mines. I told Mr. Tyler either that same evening or the next morning that I did not like to be rushed. I answered him by letter. That is my letter."

He received a letter dated July 23, 1935, signed by Tyler, reading in part as follows [R. 176]:

> "I therefore ask that, should you decide to accept this proposition, you immediately wire me at my expense, at 634 South Spring Street, Los Angeles, confirming the fact that you will send your Midwest to me, and I in turn will hold for your account 600 shares of Consolidated Mines."

Tyler called upon him at his home on March 24, 1936 and on March 28, 1936. On the latter date, he agreed to exchange his Monolith stock "for the gold enterprise." He received thereafter stock certificates 691 and 697 of Consolidated Mines of California.

Thomas J. Allen—Corvallis, Oregon [R. 128-134].

Tyler called upon him at Corvallis during the first part of 1936. Tyler solicited him to turn in his Monolith stock upon the "mining stock," representing that such transfer would be to his financial advantage.

He testified [R. 129-130]:

> "He asked for my certificate of deposit of my stock at the bank. I went to my safety deposit box, but couldn't find it. I don't remember whether I ever received a receipt for the deposit of my stock. But I turned it in. He gave me a slip and said that if I was willing to turn my stock into the mining stock, which he thought was best, that he would fix up the form that I would sign which would release my stock at the bank."

Julia Schumacher—Eugene, Oregon [R. 262-264].

On March 16, 1936, Tyler called upon her at her home. He again called upon her in July 1936. In response to his solicitation, she converted her Monolith stock into stock of Consolidated Mines of California.

A. E. Gardner—Porters Grove, Oregon [R. 269-271].

Tyler called on him in March 1936. He testified [R. 269-270]:

> "My wife was with us, and Mr. Tyler. We were given to understand that if we ever got anything out

of our Monolith stock, we would be well to exchange it for stock in this mining company. I had not known Mr. Morgan prior to this conversation, except through correspondence; as he handled the Monolith stock for the Monolith Committee. Mr. Tyler gave us to understand that Mr. Morgan sanctioned this deal and had furnished him with names of the Monolith stockholders that would be allowed to exchange their stock for shares in the mining company."

Salesman *Milton G. Alexander* [R. 134-161] testified he was employed by appellant to solicit funds from Monolith stockholders to conduct litigation against one Burnett; that he worked for appellant from August or September 1932 to December 1935; that toward the end of 1934 he was soliciting Monolith stockholders to execute the Tyler agreement; that he called upon about 2500 Monolith stockholders, taking with him the Tyler agreement; that he contacted about 1000 Monolith shareholders on behalf of the mining enterprise during the period of 18 to 20 months. He testified [R. 148-149]:

"The first trip that I made out in behalf of the gold mining enterprise, I was by myself, later I went out with Mr. Tyler for several months. I would judge I contacted about three or four hundred Monolith stockholders with Mr. Tyler. Before I went out with Mr. Tyler I did have conversations with Mr. Shaw in the Banks-Huntley Building. Various people at various times were present, Mr. Shaw, Mr. Morgan, Mr. Tyler and myself. The conversations just prior to the time Mr. Tyler and I went out on the road took place a considerable amount of time after I went out on the road myself. I went out on the road alone in March of '34, and at that time Mr. Morgan and Mr. Shaw gave me instructions.

> Then when it come time for Mr. Tyler to go out on the road with me, at the beginning of 1935, I was instructed how to handle the situation. I was to go out and contact the stockholders and give them the information of the committee's activities; also what we had done with the Tyler agreement, and then introduce Mr. Tyler to the stockholders and he would carry from there on explaining about the mine, about the activities of the mine. These were stockholders I had contacted before and knew personally, while on the committee, and some also I contacted on the Tyler agreement. I don't recall telling Mrs. Craig that our activities were limited to Monolith stockholders, other than Mr. Tyler and myself making these switches from the Monolith over to the gold mining."

He also testified [R. 151], "When Tyler and I started out on the road, I took a sales kit with me. They were prepared by the office. I imagine either Mr. Morgan or Mr. Shaw prepared them."

He further testified [R. 158]:

> "My recollection is that as we went out and tried to get these stockholders to come into the partnership agreement we also at the same time told them that should we get sufficient funds in, we would incorporate. We got 250 or 300 stockholders into the partnership agreement. Maybe I am way off on it. It seems like it was put into a corporation about the middle of '35."

Charles Wohlberg [R. 184-192] was employed by appellant as a salesman in 1935 and 1936. He testified [R. 186], "Practically all the time when I was in the field, for the mining company, I was with Mr. Tyler."

Further [R. 186-187]:

"The transfers in the main were made through Mr. Tyler. An agreement was signed whereby they agreed to transfer to Mr. Tyler their certificates and he, in turn, accepted that. I don't recall the exact detail, but I believe it stated that he in turn would deliver so many shares of stock, of his personally owned stock of the Consolidated Mines."

Further [R. 187]:

"At these transfers there was no money exchanged for stock through me, as I recall it. I worked in California and I made one trip to Oregon where I effected in this manner some exchanges. In Oregon I called on Mr. Voget who testified here yesterday among others. I went there alone by plane and I met Mr. Tyler there. Before I went to Oregon, conversations were had in Los Angeles with Mr. Morgan and Mr. Shaw in regard to the Oregon trip. That was in 1936."

Further [R. 187]:

"When I speak of 'securities' I mean the stock which Mr. Tyler owned in Consolidated Mines. I was paid by the committee and I also received some compensation from Mr. Tyler. *Mr. Tyler had possession of the stocks.* Mr. Tyler was with me practically all the time when I was making these exchanges."

R. H. Lytle [R. 210-230], an employee at the mine, testified [R. 214-215], "While I was working there Mr. Shaw visited the property once in awhile. *He told me one time that he was trying to raise about $80,000 for development of the property.*"

Paris B. Claypool [R. 288-291], a United States Internal Revenue agent, in 1938 visited appellant's offices and there met, upon numerous occasions, Tyler and appellant. He testified [R. 290]:

> "There was an account in that book that gave a listing of the proceeds received from the sale of Midwest and Monolith stock which had been received from former stockholders of those companies in exchange for Tyler partnership interests or Consolidated Mines interests. I do not recall the terminology of that particular account."

Louis R. Jacobson [R. 271-288, 291-349, 510-521] was employed by appellant as an accountant in October 1934. He testified [R. 274].

> "During the time that I was making entries in this black book, I did not have any occasion to make any entries in there pertaining to the Consolidated Mines of California, a corporation. Consolidated Mines of California, a corporation, after its incorporation did open a bank account. I believe they had but one in Los Angeles. *There was a record shown in the black book where moneys were expended and reflected in the account for and on behalf of the mine up at Calaveras County. Those moneys appeared in the Frank S. Tyler account, and also Edna F. Shaw account.*"

He opened the books of account for Consolidated Mines of California January 1, 1936. A permit was issued by the California Corporation Commissioner dated February 15, 1935. No action was taken under this permit [R. 276, 279]. A second permit was issued July 5, 1935, which authorized the issuance of 300,000 shares to Tyler

to be placed in escrow, and the issuance of 150,000 shares to be issued to Tyler in payment for mining property [R. 279, 281]. A third permit modified the second permit in that 60,000 shares were issued to Tyler and 90,000 shares issued to members of the partnership agreement, rather than the total of 150,000 shares to be issued to Tyler [R. 281-283].

He testified [R. 288]:

> "While I was working up in the offices in Los Angeles in the Banks-Huntley Building and was making records and entries in this black book, the receipts of moneys that were [148] received from the sale of Monolith and Midwest stock were recorded in that book, in the account of Frank S. Tyler. If any sales were made for cash and not for an exchange of stock of Consolidated for Monolith or Midwest, those receipts were reflected in the Frank S. Tyler account. The money received from Miss Pew was recorded in the account of W. J. Shaw, so I would have to correct my former answer to that extent; but my recollection is that it was later transferred over to the Tyler account."

He further testified [R. 293-294]:

> *"As to the receipts entering the Frank S. Tyler account or entering the W. J. Shaw account—there wasn't any great distinction as between the two accounts in so far as the disbursements were concerned, but in so far as receipts of the Tyler agreement and on the subsequent sale of the Consolidated stock of Tyler's stock, with the exception of the Pew sale for $30,000, the sale to her of Consolidated stock, I attempted to keep all such receipts in the Tyler account. That account was in the beginning at the*

head office of the California Bank. Frank S. Tyler and W. J. Shaw could sign checks on that account. I think the checks would show that Tyler signed most of them. I might say that the way Shaw did sign them would be 'Frank S. Tyler by W. J. Shaw.'"

He further testified [R. 293-294]:

"In that Tyler account were deposited the proceeds received from the disposition of Monolith and Midwest shares, in particular, the proceeds that came from the disposition of Monolith and Midwest shares that had been brought in from the shareholders who later acquired interests and exchanges therefor in the Tyler agreement and Consolidated Mines."

He further testified [R. 298]:

"Receipts from sales of Midwest stock or Monolith stock were continuously deposited to the Frank S. Tyler account. That was the principal source of revenue for the Frank S. Tyler account."

* * * * * * * *

"Mr. Alexander was the salesman who went out to solicit the Monolith-Midwest stockholders on the Tyler agreement. I think there was one other whose name I don't recollect, but he made very few deals. I don't know whether Milt Alexander solicited the Midwest stockholders directly on the Tyler agreement. When the Tyler agreement was succeeded by the Consolidated Mines of California, Charley Wohlberg at that time was soliciting the certificate holders, and Mr. Tyler was out with Charley Wohlberg making those solicitations."

Also [R. 305-306]:

"I have made a summary from these books of the total receipts from the sale of stock of the Consoli-

dated Mines of California. It is these two here (indicating). These are Exhibit No. 73. I prepared those. These receipts themselves would be represented by the liquidation of the various other securities that would have been received from both—on the original partnership agreement and then the subsequent sale by Frank S. Tyler of [*165*] *his personally owned stock.*

"In 1934 from the Monolith stock which had been received by Frank S. Tyler on the partnership agreement there was obtained the sum of $41,822.69, and the cash that was turned in by the members of the partnership on the Tyler agreement amounted to $5,237.

"The other items represent the sundry receipts of $998.78. The total for that year would be the addition of those three figures—$47,059.69, for the year 1934. In 1935, consideration received from the sale of securities, which securities were received by Tyler on the sale of his personally owned stock, was the sum of $64,971.10."

Also [R. 307-309]:

"Then in addition to the $64,971.10 received by Frank S. Tyler on the sale of securities which he had obtained on the Consolidated Mines stock, there was a sum of $10,797.72 which came in as cash representing purchases of the Consolidated Mines stock. That gives a final total of receipts for the year (1934) of $117,024.15."

* * * * * * * *

"With respect to 1935—Monolith Portland and Midwest Company stock, 28,881 shares, Monolith Portland Cement Company common, 407 shares; Monolith Portland Cement Company preferred, 1627

shares. Cash received from sundry investors, $10,790.72. And then giving the values that I have extended for these stocks, the Midwest was $41,877.45. and the Monolith common was $1,017.50, and the Monolith Portland Cement preferred was $10,574.50.

"And, adding those three together with the sundry or the cash received from sundry sources, makes a grand total of $64,260.17, and this consideration, of course, was received from the sales of Mr. Tyler's personally owned stock and had nothing to do with the original partnership agreement for '34."

Also [R. 312]:

"Proceeds received from these brokers and other sources, after disposition of the stocks, were deposited, practically in all instances in the Frank S. Tyler account. The practice was to deposit them all in the Frank S. Tyler account."

[R. 313-314]:

"When matters of policy were finally determined in respect to the sales activities of the partnership agreement those discussions would be had between W. J. Shaw and Frank S. Tyler. With respect to the sale of Consolidated Mines of California stock, they would have conferences between Tyler and Morgan and the salesmen. They would discuss matters quite generally as between Morgan, for instance, and Tyler would also discuss matters with him. There was never any one particular person. They discussed the matters with Mr. Shaw."

The witness stated [R. 317-318]:

That by document dated July 1, 1935, Tyler assigned to Shaw an 80 per cent interest in all proceeds to be realized from the Tyler partnership agreement and from the net

proceeds to be realized from the sale of capital stock which Tyler was to receive as his 40 per cent interest in the stock of Consolidated Mines of California. This document provided:

> "It is understood that the stock of Consolidated Mines of California, to be issued to me, is to stand on the books of that company, in my name, but I will, on demand, authorize the transfer of said stock to W. J. Shaw or his nominees."

[R. 321]: That the income tax return for Shaw for the calendar year 1935 recited that the consideration received by Shaw from the sale of 44,930 shares of Consolidated Mine Company stock was the equivalent of $63,862.95. The witness testified that the income tax return prepared by him for 1935 for Tyler reflected salaries, wages, commissions, fees, share of profits from sale of stock as received from Shaw in the sum of $8,000; and further testified that such income tax return for the year 1936 showed salaries, wages, commissions, fees received from Shaw in the sum of $8,735.60. He testified [R. 325]:

> "Mr. Tyler's income return here for '36 does not necessarily show income from the Tyler agreement: it shows income from the Consolidated Mines or in accordance with that memorandum agreement which Mr. Tyler signed there giving his 20 per cent interest."

[R. 338]:

> "I recall the occasion when a telephone call was put through from the offices there to Honolulu to a Mrs. Pew. Mr. Shaw conversed with her over the telephone. That was the latter part of '35. Thereafter a transaction was entered into by Mrs. Pew

in which she acquired stock in the Consolidated Mines of California. The investment was 15,000 shares of Consolidated Mines for $30,000. That was not entered in the Tyler account in the black book."

He further testified [R. 339-340]:

"As to this letter of August 7, 1935, signed by W. J. Morgan to Mr. Cline—I recall seeing that letter before or a duplicate of it. There was discussion in the office with regard to the sending out of this particular letter. I believe that discussion was between Mr. Morgan and myself. My recollection is that there was some difference in opinion between Morgan and Mr. Shaw as to some of the wording in this letter, and I know there was quite an argument over it, and there was a slight change made in it. *I do recollect that there was a discussion, particularly with reference to this letter so far as the last paragraph is concerned, with respect to the financing of the property. That reads 'The financing of the mill has been placed in the hands of Mr. Frank S. Tyler who, as secretary-treasurer of the company, is acting as an individual in the financing'*—and, as I say, I don't know whether—Morgan is the one that discussed the matter with [190] me, and I know they had quite a row previously. At the time he came out of Shaw's office, and I think it was Morgan that stated that the word 'financing' shouldn't be included in that letter, that it was not proper because Tyler was not financing the property. My recollection is that the letter was stopped. I don't know how many were mailed."

Also [R. 343-344]:

"As to this certificate of Homer J. and Florence B. [193] Arnold, dated December 14, 1936, No. 732. Certificate No. 732 came from Consolidated

stock of Frank S. Tyler from certificate No. 716. 716 for 4,000 shares to Frank S. Tyler was transferred from Frank S. Tyler from certificate No. 680 for 5,000 shares. That was dated February 15, 1936. Certificate No. 680 for 5,000 shares was issued to Frank S. Tyler and came from certificate 666, 5,000 shares that has been issued to J. R. McKiver. The certificate No. 666 is an original issue; that is as far back as we can go.

"There is certificate No. 679 for 5,000 shares that was issued to Frank S. Tyler on February 15, 1936, and that came from certificate No. 665 for 5,000 shares, which is issued under date of February 15, 1936. There is a stock ledger. 10,000 shares of stock was issued to McKiver, February 15, 1936, under the third permit. I don't know why they gave him 10,000 shares. They had some understanding there, Tyler or Shaw, with Mr. McKiver. He was to receive 10,000 shares. The Woodruff certificate No. 741 is for 30 shares of stock issued to Regina Woodruff on May 13, 1937, and that was transferred from Frank S. Tyler certificate dated August 26, 1937, on certificate No. 716 originally for 4,000 shares. August 26, 1937—that was beyond my time.

"Goodrich, 740, 18 shares, that is the same transaction. It goes back to certificate 716, and then back, and comes from the private stock. And Voget, 691. That goes back to the other McKiver certificate. And Voget's 696 is out of [194] 676 and 679 and goes back to 679, McKiver.

"As to the list of stockholders under certificate No. 3 of the Corporation Commissioner, as to J. R. McKiver and L. D. Gilbert, 20,000—that is the Gilbert who was here testifying that was managing the mine for about three years. The stock books show 10,000 to Gilbert and 10,000 to McKiver."

Also [R. 511]:

"As to Mr. Shaw's private deals, under Monolith stock sold for '34 and '35 and '36, from this statement we can't determine what part of those sales would be represented by any of the considerations turned in on the Tyler original agreement or from the sale of Tyler's personally owned stock."

Also [R. 515]:

"The Corporation Department took exception to the manner in which the stock was issued. That was issued all to [351] Frank S. Tyler, and those individuals out of the original permit. They required that we recall that and issue one certificate directly to Frank S. Tyler for the whole 150,000 shares."

Also [R. 517]:

"The company got the moneys to operate during '36, '37 and '38 from mint receipts and also from advances made by Frank S. Tyler and/or Shaw. Mr. Shaw advanced, according to the records, $35,000 from February 1, 1936, up to the present time."

Sam Green—Los Angeles [R. 385-386].

He was a Los Angeles broker and had an account for Tyler during the years 1935, 1936 and 1937. He testified:

"Mr. Shaw gave me the instructions on buying and selling items that came to me in the for sale in the Frank S. Tyler account."

(*Sic.* Mr. Shaw gave witness instructions concerning the manner in which items comprised in the Frank S. Tyler account should be purchased and sold.)

J. Arthur Hughes [R. 389-398].

From records furnished by Tyler and appellant, he prepared Government Exhibit 94, "Schedule of Cash Receipts and Cash Disbursements of Frank S. Tyler for the Years 1934-1937." This schedule shows that during this four-year period receipts for Consolidated Mines stock sold for cash were $16,834.72, that total receipts during the same period were $273,176.68. Disbursements totalled the same figure. Exhibit 94 also reflects expenditures at the time of $48,611.09 during this period.

This witness also prepared Government Exhibit 95, reflecting the net profit from sales of Monolith stock, Consolidated Mines stock sold for cash and cash taken in on the Tyler agreement during 1934-1937, and reflecting total receipts of $146,605.07, total disbursements of $73,-802.90, with a net profit therefrom of $72,802.17 to Tyler and appellant.

Appellant William J. Shaw [R. 521-551] testified [R. 546]:

> "As to my income tax return of 1936, Exhibit No. 38, I see it. I see the last item is—amount paid to Frank S. Tyler as share of profit on sale of Consolidated Mines stock, total consideration received therefor $43,838.05, Frank S. Tyler receiving 20 percent thereof in accordance with agreement and that Tyler's 20 percent is set out as $8,735.60. Is that all charged up—giving Morgan that here, $8,000? He got a whole lot more than that in the year of 1936. I signed this return."

He further testified [R. 551]:

> "The Consolidated Mines Company does not owe me any money now. That $37,000 I charged that off. I gave it to them. I said, 'Never charge any money to me.' They could have it."

NO. 9920

United States

Circuit Court of Appeals

For the Ninth Circuit.

J. HOWARD PORTER, JOHN C. PORTER and PAUL D. PORTER, identified under the Trade Name PORTER PROPERTY TRUSTEES, LTD.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES:

For Taxpayer:
BENJ. W. HENDERSON
W. G. EDLING, Esq.

For Commissioner:
JOHN H. PIGG, Esq.
E. M. WOOLF, Esq.

Docket No. 95762

J. HOWARD PORTER, JOHN C. PORTER and PAUL D. PORTER, Trustees Identified Under the Trade Name PORTER PROPERTY TRUSTEES, LTD.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1938

Oct. 8—Petition received and filed. Taxpayer notified. (Fee paid).

Oct. 8—Copy of petition served on General Counsel.

Nov. 23—Answer filed by General Counsel.

Nov. 23—Request for circuit hearing in Los Angeles, California, filed by General Counsel.

1938

Nov. 30—Notice issued placing proceeding on Los Angeles, Calif., Calendar. Copy of answer and request served.

1939

July 25—Hearing set Sept. 18, 1939 in Los Angeles, California.

Sept. 20—Hearing had before Mr. Kern on the merits. Submitted. Appearance of W. G. Edling and stipulation of facts filed. Briefs due Nov. 6, 1939; Reply briefs due Nov. 27, 1939.

Oct. 17—Transcript of hearing Sept. 20, 1939, filed.

Nov. 6—Brief filed by taxpayer. 11/7/39 copy served on General Counsel.

Nov. 6—Brief filed by General Counsel.

Nov. 27—Reply brief filed by taxpayer.

1940

Sept. 6—Findings of fact and opinion rendered, Kern, Div. 16. Decision will be entered under Rule 50.

Oct. 31—Computation of deficiency filed by General Counsel.

Nov. 4—Hearing set Dec. 4, 1940 on settlement.

Dec. 2—Objections to respondent's computation filed by taxpayer. 12/2/40 copy served on General Counsel.

Dec. 2—Computation of deficiency filed by taxpayer.

Dec. 4—Hearing had before Mr. Smith on settlement under Rule 50. Continued 2 weeks, Dec. 18, 1940.

1940

Dec. 4—Order continuing proceeding to 12/18/40, Wash. D. C., entered. [1*]

Dec. 18—Hearing had before Mr. Kern on settlement under Rule 50. Contested. C. A. V. Respondent's alternative recomputation filed. Copy of letter 12/17/40 filed. 1935 Capital Stock Tax Return filed.

Dec. 30—Transcript of hearing of Dec. 18, 1940 filed.

1941

Mar. 5—Decision entered, J. W. Kern, Div. 16.

June 2—Petition for review by United States Circuit Court of Appeals, Ninth Circuit, with assignments of error filed by taxpayer.

June 4—Affidavit and proof of service filed by taxpayer.

July 28—Statement of evidence filed by taxpayer.

Aug. 5—Proof of service and notice of lodging statement of evidence filed.

Sept. 3—Agreed praecipe for record filed by taxpayer—proof of service thereon. [2]

*Page numbering appearing at top of page of original certified Transcript of Record.

United States Board of Tax Appeals
Docket No. 95762

J. HOWARD PORTER, JOHN C. PORTER, and PAUL D. PORTER, Trustees, identified under the trade name PORTER PROPERTY TRUSTEES, LTD.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REDETERMINATION OF INCOME, EXCESS-PROFITS AND SURTAX DEFICIENCY FOR THE YEAR ENDING DECEMBER 31, 1935.

Comes now, J. Howard Porter, John C. Porter and Paul D. Porter, Trustees, by the said J. Howard Porter, and hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:LA-FC, FHG-90D, Los Angeles, California, dated July 11, 1938, and as a basis for this proceeding allege as follows:

1. That the petitioners are J. Howard Porter, John C. Porter, and Paul D. Porter, Trustees, identified as a Board of Trustees under the trade name Porter Property Trustees, Ltd., and that their address is 205 South Broadway, Los Angeles, California.

2. The notice of deficiency, a copy of which is attached hereto and marked "Exhibit A", was mailed to the petitioners on July 11, 1938.

3. The taxes in controversy are income tax, excess-profits tax and surtax for the calendar year 1935 and in the amount of $6,029.98. [3]

4. The determination of tax set forth in the said notice is based upon the following errors.

(a) The Commissioner erred in determining that the taxpayers are an association within the meaning of Section 801(a)(2) of the Revenue Act of 1934 and Articles 801-2 and 801-3 of Regulation 86, and are taxable as a corporation, and that as such are subject to the excess-profits tax imposed by Section 702 of said Act, as well as to the liability for surtax imposed by Section 251(a), and the penalty in conformity with Section 351(c) and Section 291 of the said Revenue Act of 1934.

(b) The Commissioner erred in disallowing a deduction from income of $4516.72 for legal fees and expense during said calendar year 1935.

(c) The Commissioner erred in computing as an additional income to these taxpayers item (d) on Page 3 of his statement, "Payments received on Contracts" in the amount of $1,627.10.

(d) The Commissioner erred in disallowing as a deduction from income the Stockholders liability assessment in the amount of $2,202.50, as shown on Page 2, Paragraph 4 of his report.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) That on or about the 28th day of February, 1935 Katie E. Porter and James Porter executed a trust instrument and in connection therewith made an irrevocable transfer to the trustees of said trust of certain property then owned individually by them as their sole and separate property. It was the desire and intention of these trustors to make a present gift of the property in question for the benefit of their five living children and to so place the [4] same in trust that it might be most conveniently and advantageously distributed to the named beneficiaries. The trustors named J. Howard Porter, John C. Porter and Paul D. Porter as designated trustees to administer the trust estate coming into their hands by virtue of the said trust instrument and the details, the said transfers and establishment of said estate, were duly carried out as of February 28, 1935.

The trust instrument provides that the trustees shall not be subject to the trustors nor to the beneficiaries in any manner whatsoever, and that the said beneficiaries shall be named and registered in the Records of the trustees, and that the trustees may, at any time in their discretion and from any available funds in the estate, make partial distribution and ultimately, upon closure of the estate, shall distribute the entire residual fund to the said beneficiaries. The property was irrevocably transferred as a gift in trust for the benefit of the children, and the gift tax paid thereon. No certificates of benefi-

cial interest, transferable or non-transferable, were provided for and none have been issued.

The property making up the corpus of this estate consisted of real estate, farm and city property, land contracts, corporation stock and various kindred personal property. The trustees carried on the activities peculiar to or associated with the said property and for the taxable year ending December 31, 1935 filed income tax returns on Form 1040, together with Fiduciary returns on Form 1041. These disclose that the taxpayers reported a total net income derived from farm property, rentals, landowners royalties and minor items of interest collected on outstanding land contracts. In [5] exercise of discretion vested in the trustees, no distribution to beneficiaries was made for the taxable year 1935.

These taxpayers therefore contend that they are taxable under the Revenue Act of 1934 as a pure ancestral trust and not as a corporation.

(b) That the deduction from income in the amount of $4,516.72 for legal services and expense is made up of items expended in defending and settling liabilities against the trustees as such, and the trust estate, and not for the purpose of clearing or securing titles to the properties involved, and should, therefore, be allowed.

(c) The instalment land contract payments listed as item (d) in the Commissioner's Report, cover payments received from land sold prior to February 28, 1935 and which contracts were acquired by the

taxpayers as part of the corpus of the trust estate. Under Article 44-5, Regulation 94, any gain because of said instalment contracts is taxable to the predecessor in interest.

(d) The taxpayers acquired as part of the corpus of the trust estate certain stock of Morrison Savings Bank, Morrison, Iowa, which bank failed and was liquidated under a receivership. During the year 1935 the receiver levied an assessment against said stock in the amount of $2,202.50, which was paid by the taxpayers. The said amount was a total loss determined and paid during the calendar year 1935, and should be allowed as a deduction against income.

Wherefore, your petitioners pray that your Board may hear this proceeding and that it be determined,

1. That the petitioning taxpayers be taxed as a pure [6] ancestral trust and not as a corporation;

2. That the deduction against income for legal fees, in the amount of $4,516.72, be allowed;

3. That the payments received on contracts, in the amount of $1,627.10, be not added to income;

4. That the stock assessment, in the sum of $2,202.50, be allowed as a deduction against income.

5. Such further and other relief as to this Board may seem just.

Signed J. HOWARD PORTER

BENJAMIN W. HENDERSON,

Attorney for Petitioners.

State of California,
County of Los Angeles—ss.

J. Howard Porter, being duly sworn, says: that he is one of the trustees of the Board of Trustees, petitioners above named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts he believes to be true.

J. HOWARD PORTER

Subscribed and sworn to before me this 6th day of October, 1938.

[Seal] FRANK G. FALLOON,
Notary Public in and for the County of Los Angeles, State of California. [7]

EXHIBIT "A"

Treasury Department
Internal Revenue Service
939 South Broadway
Los Angeles, Calif.

Jul 11 1938

Office of
Internal Revenue Agent
in Charge
Los Angeles Division

IT:LA-FC
FHG-90D

Porter Property Trustees, Ltd.,
901 Civic Center Building,
Los Angeles, California.

Sirs:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1935 discloses a deficiency of $1,458.59; that the determination of your excess-profits liability for the year mentioned discloses a deficiency of $653.06; and that the determination of your surtax liability as a personal holding company for the year mentioned discloses a deficiency of $3,134.66 and penalty of $783.67; as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies above stated.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, 939 South Broadway, Los Angeles, California, for the attention of IT:LA-FC. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner,

By GEORGE D. MARTIN, (signed)
Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of Waiver. [8]

STATEMENT.

IT:LA-FC
FHG-(90D

Porter Property Trustees, Ltd.,
901 Civic Center Building,
Los Angeles, California.

Tax Liability for Taxable Year Ended December 31, 1935.

	Tax liability.	Tax assessed.	Deficiency.
Income Tax	$1,795.90	$ 337.31	$1,458.59
Excess-profits tax	653.06	None	653.06
Surtax Sec. 351, (personal holding company)	3,134.66	None	3,134.66
25% penalty			783.67

In making this determination of your income tax and excess-profits tax liabilities, and of your liability for surtax as a personal holding company, careful consideration has been given to the internal revenue agent's report dated September 28, 1937; to your protests dated October 27, 1937 and April 18, 1938; to the statements made at the conference held on December 28, 1937; and to the information presented in connection with the consideration of your case by the Los Angeles Division of the Technical Staff of the Bureau.

It is held that your organization is an association within the meaning of Section 801(a)(2) of the Revenue Act of 1934 and Articles 801-2 and 801-3 of Regulation 86, and is taxable as a corporation.

In conformity with the holding that you are taxable as a corporation, you are subject to the excess-profits tax imposed by Section 702 of the Revenue Act of 1934.

You are further advised that you are subject to the liability for surtax imposed by Section 351(a) of the Revenue Act of 1934, since the income received and the ownership of shares during the taxable year bring you within the definition of a personal holding company as set forth in subdivision (b)(1) of said section 351 and Article 351-2 of Regulations 86. [9]

Inasmuch as you failed to file a return on Form 112QH as required by Article 351-8 of Regulations 86, 25 per centum of the tax computed under Section 351(a) has been added thereto in conformity with the provisions of Section 351(c) and Section 291 of the Revenue Act of 1934.

The contention raised by you in your protest dated April 18, 1938, that you should be allowed a loss (in an unnamed amount) alleged to have been sustained in the liquidation of the James Porter Investment Company, is denied for the reason that the information received does not indicate that you sustained a deductible loss in any amount. No such loss was claimed in your return.

Your books and records disclose that you expended $4,516.72 during the taxable year for legal fees and expenses. No deduction for such expenditures was claimed in your return. You now contend in your protest that you should be allowed a

deduction from income for the full amount of $4,516.72, but no information has been furnished to show that the amount was expended for ordinary and necessary expenses in connection with your trade or business. The deduction is therefore denied as not meeting the requirements of Section 23(a), Revenue Act of 1934.

Your protest contends for a deduction, not claimed in your return, for an amount of $2,202.50 stockholder's liability incurred by the James Porter Investment Company but paid by you in the taxable year, in connection with the ownership of certain stock in the Morrison Savings Bank, Morrison, Iowa. The payment made has been disallowed as a deduction for income tax purposes for the reason that it has not been substantiated as a loss properly deductible under the provisions of Section 23(f) of the Revenue Act of 1934.

A copy of this letter and statement has been mailed to your representative, Mr. Benjamin W. Henderson, 901 Civic Center Building, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau. [10]

ADJUSTMENT TO NET INCOME

Taxable year ended December 31, 1935.

Net income as disclosed by return on Form 1040		$ 7,192.38
Unallowable deductions and additional income:		
(a) Oil income and royalties increased	$35,714.40	
(b) Farm income increased	552.81	
(c) Miscellaneous income	106.19	
(d) Payments received on contracts	1,627.10	
(e) Interest received on contracts	859.15	
Total additions	$39,859.65	
Additional deductions:		
(f) Interest paid	$ 2,497.45	
(g) Taxes paid	2,826.18	
(h) Loss Porter Land Co.	20,000.00	
(i) Office expenses	144.59	
(j) Salaries, Commissions, and miscellaneous	7,636.71	
(k) Depreciation allowable	886.00	
Total	$33,990.93	
Net adjustment to income		$ 5,862.72
Net income as adjusted		$13,061.10

[11]

EXPLANATION OF ADJUSTMENTS.

(a) Income from oil properties and royalties, as shown by your books and records:

Shell Oil Company		$12,000.58
Standard Oil Company $514.25; bonus $46,000.00		46,514.25
Petrol Corporation		281.46
Texas Company, bonus		4,800.00
Total income		$83,596.29
Less depletion at 27½%		17,488.98
Net amount reportable		$46,107.31
Amount included in return:		
Oil royalties	$12,282.64	
Ground rent	488.00	
Total income	$12,770.64	
Less depletion	3,377.73	9,392.91
Net additional income		$36,714.40

(b) Farm income:

Crop rent from section 16, Nobles Co., Minn.	$ 960.12
Rent received from Kern County acreage	620.00
Total receipts	$ 1,580.12
Less wages for supervising	500.00
Net income from farm properties	$ 1,080.12
Amount reported in return	527.31
Additional income	$ 552.81

(c) Miscellaneous income, not identified, not included in your return $106.19.

(d) Profit from payments received on contracts of sale:

Name of contract	Receipts 1935	Percentage of profit.	1935 Profit reportable.
Daisy Cardoze	$ 119.10	33⅓%	$ 39.70
A. Alexis	94.03	20%	18.81
F. Alexis, Jr.	423.88	1/9	47.10
Harmon	853.10	20%	170.62
Ahman	2,693.45	34.991%	942.47
Detmore	542.00	20%	108.40
Thompson, et al	733.24	33⅓%	244.41
Azends	214.21	20%	42.84
Fife	76.49	1/6	12.75
Total profit reportable			$1,627.10

[12]

The collections made on contracts as indicated represent taxable income to the amount of $1,627.10, under the provisions of Section 22(a) of the Revenue Act of 1934.

(e) Interest received on contracts of sale represents taxable income, for which no amount was included in your return.

(f) Deductible interest was paid by you during the taxable year to the amount of $3,838.95, but only $1,341.50 was claimed as a deduction in your return.

(g) Taxes were paid on your property during the taxable year, representing allowable deductions from income, in a total sum of $3,884.62, whereas the deduction claimed in your return was only $1,058.44.

(h) The James Porter Investment Company entered into a contract with Porter Land Company to furnish seed and labor for the 1935 crop. The contract was assumed by you and you actually paid $19,000.00 of the costs; $1,000.00 having been advanced by the James Porter Investment Company. Nothing was received from the investment and, since you took over all assets at the basis to the Investment Company, the entire loss is allowable to you.

(i) Office expenses; consisting of supplies and repairs $76.02, insurance $49.72, and miscellaneous items $18.85; represent allowable deductions from gross income under section 23(a), Revenue Act of 1934.

(j) Salaries, wages, commissions, and other expenses, represent allowable deductions from income under the provisions of Section 23, Revenue Act of 1934, as follows:

Wages, miscellaneous		$ 474.80
Salary James Porter	$5,000.00	
Less amount chargeable to predecessor corporation	833.33	4,166.67
Salary Howard Porter	$2,500.00	
Less chargeable to corporation	416.67	2,083.33
Commissions, C. W. Bloemer		921.11
Title and escrow fees		187.00
Appraisal and other expenses		131.70
Total		$7,964.61

Amount claimed in return	327.90
Additional deduction	$7,636.71

[13]

(k) Depreciation is allowable as follows:

Section 16; value of buildings $17,400.00; estimated life 25 years; depreciation at 4%	$ 696.00
Kandiyohi Co. Building; value $4,750.00; estimated life 25 years; depreciation at 4%	190.00
Depreciation allowable (none claimed in return)	$ 886.00

COMPUTATION OF TAX.

Taxable year ended December 31, 1935.

Income Tax.

Net income as adjusted	$13,061.10
Income tax at 13¾%	1,795.90
Income tax assessed; original return, Form 1040 account No. 820825	337.31
Deficiency of income tax	$ 1,458.59

Excess-Profits Tax.

Net income for excess-profits tax computation	$13,061.10
No declared value of shares—no capital stock return filed.	
Net income subject to excess-profits tax	13,061.10
Excess-profits tax at 5%	653.06
Excess profits tax assessed (only Form 1040 filed)	None
Deficiency of excess-profits tax	$ 653.06

Surtax—Personal Holding Company.

Net income for surtax computation	$13,061.10
Adjustments under sec. 351(b)(3)	None.
Less 20% of adjusted net income	2,612.22
Undistributed adjusted net income	$10,448.88
Surtax under Sec. 351(a) at 30%	$ 3,134.66
Surtax paid (only Form 1040 filed)	None
Deficiency of surtax under Sec. 351	$ 3,134.66
Penalty; 25% addition to tax under Sec. 291	783.67
Deficiency of surtax and penalty	$ 3,918.33

[Endorsed]: U. S. B. T. A. Filed Oct. 8, 1938. [14]

[Title of Board and Cause.]

ANSWER

Comes now the respondent, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are income tax, excess profits tax and surtax for the calendar year 1935, but denies the remaining allegations contained in paragraph 3 of the petition.

4. (a), (b), (c), (d) Denies the allegations of error set forth in subparagraphs (a), (b), (c), and (d) of paragraph 4 of the petition. [15]

5. (a), (b), (c), (d) Denies the allegations contained in subparagraphs (a), (b), (c), and (d) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the petition be denied and that the respondent's determination be in all respects approved.

Signed J. P. WENCHEL,
FTH
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:
ALVA C. BAIRD,
FRANK T. HORNER,
E. A .TONJES,
Special Attorneys,
Bureau of Internal Revenue.

EAT:E 11/15/38

[Endorsed]: U. S. B. T. A. Filed Nov. 23, 1938.
[16]

[Title of Board and Cause.]

FINDINGS OF FACT AND OPINION

Docket No. 95762. Promulgated September 5, 1940.

1. On the facts petitioner is an association taxable as a corporation.

2. Petitioner made a lease of land thought to be oil producing. The lessee in partial consideration for the lease paid to petitioner a cash bonus. No oil was discovered on the premises and they were reconveyed to petitioner. Held, the bonus was not a royalty within the meaning of section 351, Revenue Act of 1934.

3. On the facts, the fair market value of certain land payment contracts transferred to petitioner, as of the time of transfer, was the face amount of the balances due thereon.

4. Amount paid by petitioner as an assessment on bank stock owned by it is not deductible as a loss in the year of payment.

Benjamin W. Henderson, Esq., and Wilford G. Edling, C. P. A., for the petitioners.

John H. Pigg, Esq., for the respondent.

This case involves a deficiency in taxes of the Porter Property Trustees, Ltd. (hereinafter referred to as the petitioner), resulting from respondent's determination for the year 1935, as follows:

Income tax	$1,458.59
Excess profits tax	653.06
Surtax on personal holding company	3,134.66
Penalty of 25 percent for failure to file a personal holding company return	783.67

The petitioner raised four assignments of error in its petition, but as no evidence was presented on the claim for a deduction of legal fees, the claim having been denied by the respondent in his answer, we must assume that this claim has been abandoned. The principal question is whether petitioner is taxable as an association under section 201 (a) (2) of the Revenue Act of 1934, as respondent contends, or as a trust; and secondary questions, are whether petitioner [17] derived income from sale contracts during the year 1935 in the amount of $1,627.10, as respondent determined, and whether it is entitled to a deduction, denied by respondent, for its payment of $2,202.50 in that year because of an assessment levied against the stockholders of a certain defunct bank.

The facts were stipulated in part and in part developed from testimony at the hearing.

FINDINGS OF FACT.

J. Howard Porter, John C. Porter, and Paul D. Porter, are the trustees of the petitioner, Porter Property Trustees, Ltd., an express trust, created by a written instrument dated February 28, 1935. Before February 28, 1935, the entire outstanding capital stock of the James Porter Investment Co., a Delaware corporation, consisting of 2,808 shares, was owned and held by James Porter and Katie E. Porter, husband and wife, and members of their family. The following table shows the interest and relationship of each stockholder:

Name	Relationship	Shares held
James Porter	Father	685
Katie E. Porter	Mother	1,858
Paul D. Porter	Son	50
B. F. Shumway	Nominee for father	65
W. N. Dennison	Husband of daughter (Elizabeth)	50
Rebecca P. Wells	Daughter	50
James Howard Porter	Son	50
John C. Porter	Son	0
Elizabeth P. Dennison	Daughter	0
Total		2,808

On February 28, 1935, and for some time before then, the James Porter Investment Co. was the owner of certain personal property, and also held in fee simple certain land, mainly agricultural and unimproved, and situate in Kern County and San Luis Obispo County, California, Nobles County, Minnesota, and Grundy County, Iowa. This land was acquired by the James Porter Investment Co. at the time of its incorporation in 1930, from James Porter and Katie E. Porter in exchange for its capital stock. Such of its personal property as was not acquired by that company in a like manner, and at the same time, was acquired by the company in the course of its ordinary business activities afterwards but before February 28, 1935. Certain of these lands had been improved before and during the period held by the company, and farming operations were carried on by leaseholders for profit on part of these lands while they were owned and held by the company.

On February 28, 1935, James Porter, Katie E. Porter, Paul D. Porter, F. B. Shumway, W. M. Dennison, and James Howard Porter, as grantors, and James Howard Porter, Paul D. Porter, and John C. [18] Porter, as trustees (hereinafter sometimes referred to as the trustees), executed and entered into a written "Conveyance and Contract" agreement, incorporated herein by reference, the relevant parts of which are later set out, by which the trust involved herein, known as the Porter Property Trustees, Ltd., was created. By the terms of the trust instrument, the trustees were selected and appointed by the grantors, and were therein designated and described as the board of trustees and were authorized to act under and use the trade name of Porter Property Trustees, Ltd. There were transferred and conveyed to the trustees at the time of creation of the trust 1,723 shares of the capital stock of the James Porter Investment Co., which constituted all the shares shown in the table above, except the 685 shares in the name of James Porter and 400 of the 1,858 shares in the name of Katie E. Porter. On the day of their constitution as such, February 28, 1935, the trustees, acting in their collective capacity, acquired from James Porter the 685 shares noted above in consideration for their assumption of his debt in the amount of $52,000.

The interests of the respective trust beneficiaries are described in the trust instrument as "expectancy fractions." Article 15 of the trust instrument provides as follows:

Art. 15. Registration & Dormant Fractions:

Expectancy Fractions under this administration shall at first be allotted in the records of the Board under instructions delivered to the Board by James Howard Porter. Should fractions appear dormant thereby, while held dormant they shall not be reckoned with when apportioning in distributions, such being computed solely by or upon the fractions registered as to beneficiaries at time of making each distribution. Dormant fractions, their usefulness being contingent upon possible future conveniences, remain subject to the discretion of the Trustees.

Pursuant to the provisions of "Art. 15" of the trust instrument, under instructions from James Howard Porter, expectancy fractions were allotted in the records of the board of trustees as follows:

Name	Expectancy fractions
Paul D. Porter	290/1000
John C. Porter	290/1000
Rebecca P. Wells	65/1000
Elizabeth P. Dennison	65/1000
James Howard Porter	290/1000
Total	1000/1000

Immediately after the trustees had acquired the 2,408 shares of the James Porter Investment Co. on February 28, 1935, as set forth above, they exchanged them with that company for all its assets

(except one parcel of real estate situate in Grundy County, Iowa, known as the Porter Homestead), subject to its then outstanding liabilities. Shortly thereafter the company was liquidated and dissolved. [19]

Included among the assets of the company thus acquired were certain land sale contracts which provided for future payments by the purchasers, some of them not becoming due and payable until after their acquisition by the trustees. At this time the company was treating with the Standard Oil Co. for the lease by the latter of a part of these lands situate in Kern County, California. The negotiators had by then reached an agreement for the execution of a lease which was to be executed by the James Porter Investment Co. for the use and benefit of the Porter Property Trustees, Ltd., and then to be assigned to the trustees. This was accordingly done. Under its terms the lessee was obligated to explore, develop, and drill certain wells on the leased land for oil or gas of commercial quality and in commercial quantity. This was done but no oil or gas was found, and the lessee quitclaimed its interest to the trust in the year 1938. Under the terms of this lease agreement, certain oil and gas royalty interests were retained by the lessor, in addition to the bonus paid by the lessee for the execution of the lease.

The trust instrument provided for the following additional matters: (1) The trustees were given the

power to sell and to convey and deliver any, all, or such of the trust properties as they might see fit, in their discretion; (2) the trustees were authorized to add to their number and to choose their successors, provided that the number of trustees should at no time exceed five; (3) the trustees and/or their successors were to hold the trust properties throughout the existence of the trust; (4) the trust was to continue indefinitely for any lawful term; (5) the trustees were authorized to act together, informally over their individual signatures, or collectively, under the name of Porter Property Trustees, Ltd., through duly authorized officers of their board; (6) the trustees, acting as the board of trustees, were authorized to delegate to, by proper resolution, any member or members of the board the necessary authority to transact any and all business of the trust, including the execution of deeds, conveyances, and other instruments in writing; (7) the trustees, in whom "legal and equitable title to all estate properties are vested", were made the absolute owners of the trust properties, with full powers of management thereof; (8) provision was made for regular and special meetings of the board of trustees; (9) the trustees were authorized to engage in any lawful business; to own real estate and personal property in any of the several states, without limit; to buy, sell, improve, exchange, assign, convey and deliver, and to grant trust deeds, and to mortgage or otherwise encumber for obligations; to own stock in or entire charters

of corporations; and to engage the trust funds and properties in any industry or investment in their discretion, hoping thereby to make gain for the trust; (10) the trustees were authorized to and did adopt a [20] common seal; (11) the trustees were authorized to regard the trust instrument as their guide, and to supplement the same from time to time by proper resolutions written into the office records of the board of trustees, or to adopt formal bylaws or rules of business conduct; (12) the trustees were authorized to elect a presiding officer, or president, and to select and appoint a board secretary, and to delegate duties and authority to them; (13) the trustees were authorized to fix and pay all compensation of officers, agents, and employees, and to pay to themselves such reasonable compensation as might be determined by a regular act of their board; (14) the trustees were required to keep a faithful financial record of all business transactions, and the name and address of each known beneficiary; (15) all income and trust funds, when collected or paid over to the trustees, were to constitute a fund from which the trustees should pay trust obligations, reinvest or distribute to the beneficiaries, in their discretion; (16) the personal liability of the trustees was limited to the value of the trust funds and properties; (17) the filing of a copy of the trust instrument in the public records of some designated county was to be constructive notice to the world of such specific personal liability limitations of the trustees, and that all persons,

corporations, or companies extending credit to, contracting with, or having claims against the trustees must look only to the funds and properties of the trust for payment or discharge of such obligations; (18) the trustees might provide for annual or other meetings of the trust beneficiaries to hear and discuss reports and forecasts; (19) while they might adopt resolutions of protest or commendation, no act of the beneficiaries, as such, should be mandatory or interfere with the right of the trustees exclusively to manage the business affairs and control the trust funds and properties; (20) the death of a beneficiary should not entitle his legal heirs or representatives to demand any partition of or interest in or distribution from the trust funds or properties, but his legal heirs might succeed to his interest; (21) changes in beneficiaries from any cause should be duly noted by the trustees on their records; (22) the trustees might at any time, in their discretion, and from any available trust funds, make partial distributions to beneficiaries, and ultimately, upon termination of the trust, should distribute the entire residual trust funds to the beneficiaries in accordance with their proportionate interests; (23) the trust was irrevocable; (24) the beneficiaries might be called by the trustees to meet annually or at other times and they might adopt resolutions but no act of the beneficiaries should be mandatory on the trustees.

James Howard Porter has been, since the trust's inception in 1935, the president of its board of

trustees and, with the two other trustees, has managed its business during the same period. He has been more [21] active than the other trustees in its management. He confers informally with the other trustees. Farm lands owned by the trust are leased to farmers for profit. James Howard Porter executes all leases on behalf of the trust and he attempts to negotiate only such leases as will prove profitable to the trust. The affairs of the trust were carried on during the year 1935 in accordance with the terms of the trust instrument. Of the amount of $63,596.29 determined by respondent to have been derived by the trust from "oil royalties" during the year 1935, $46,000 represents a bonus received by the trust from the Standard Oil Co. of California as consideration for the execution of the lease already mentioned.

The James Porter Investment Co. sold certain land on installment contracts before February 28, 1935, and on that day transferred the contracts to the petitioner. The fair market value of these contracts at the time of this transfer was equal to the face amount of the balances due thereon. In 1935 petitioner received payments in the aggregate amount of $5,749.50 on account of the contracts.

The James Porter Investment Co. was the owner of an undisclosed number of shares in the Morrison Savings Bank of Morrison, Iowa, before February 28, 1935, and on that day transferred these shares to the petitoiner. In 1932 or 1933 a receiver of the bank was appointed and at an undisclosed date the

receiver levied an assessment on all the bank's shareholders. Petitioner paid $2,202.50 in 1935 in full satisfaction of its share of the assessment, pursuant to a notice of assessment received by it in the taxable year, which notice was the first notice given of such assessment.

In arriving at the adjusted net income of $13,-061.10 for the year 1935, as shown by the notice of deficiency, the Commissioner determined that petitioner had a gross income of $74,794.64, for that year, derived as follows:

Farm income	$ 1,580.12
Payments Land contracts	8,652.89
Oil royalties	63,596.29
Miscellaneous income	106.19
Interest	859.15
Gross income	74,794.64

In the deficiency notice the Commissioner determined that in 1935 petitioner was an association taxable as a corporation within the meaning of section 801 (a) (2) of the Revenue Act of 1934 and articles 801 (2) and (3) of Treasury Regulations 86, and he further determined that petitioner was a personal holding company within the meaning of section 351 (b) (1) of the Revenue Act of 1934 and article 351 (2) of Regulations 86. In his determination of the deficiencies involved, the Commissioner increased the net income as reported by [22] the trust for the year 1935 by the amount

of $1,627.10, on account of land contract payments received by the trust during that year, in application of section 22 (a) of the Revenue Act of 1934. The respondent also disallowed a deduction claimed, with the following explanation of his act in the deficiency notice:

> Your protest contends for a deduction, not claimed in your return, for an amount of $2,202.50 stockholder's liability incurred by the James Porter Investment Company but paid by you in the taxable year, in connection with the ownership of certain stock in the Morrison Savings Bank, Morrison, Iowa. The payment made has been disallowed as a deduction for income tax purposes for the reason that it has not been substantiated as a loss properly deductible under the provisions of Section 23 (f) of the Revenue Act of 1934.

Within the time provided by law the petitioner trust filed an individual income tax return for the year 1935, under Title I of the Revenue Act of 1934, disclosing thereon a net income of $7,192.38 and a tax liability of $337.31. No other return was filed by petitioner for the year 1935, and as a consequence respondent notified the petitioner of a penalty as follows:

> Inasmuch as you failed to file a return on Form 1120H as required by Article 351-8 of Regulations 86, 25 per centum of the tax computed under Section 351 (a) has been added

thereto in conformity with the provisions of Section 351 (c) and Section 291 of the Revenue Act of 1934.

OPINION.

Kern: The principal issue is whether the petitioner, Porter Property Trustees, Ltd., was an association taxable as a corporation, or a trust. On the theory that it was an association, respondent claims the personal holding company surtax and nonfiling penalty.

The question is no longer novel, having received consideration from the Supreme Court in several cases, in the latest of which, Morrissey v. Commissioner, 296 U. S. 344, the Court reviewed at length the course of its earlier decisions and the dependent Treasury regulations seeking to interpret them, and laid down criteria which must guide us here. Cf. Swanson v. Commissioner, 296 U. S. 362; Helvering v. Combs, 296 U. S. 365; Helvering v. Coleman-Gilbert Associates, 296 U. S. 369, all decided on the same day as Morrissey's case. Both parties cite the Morrissey case as authority for their opposite contentions. A glance at it will suffice to show the governing principles. The Court said:

> "Association" implies associates. It implies the entering into a joint enterprise, and, as the applicable regulation imports, an enterprise for the transaction of business. This is not the characteristic of an ordinary trust * * *. Such beneficiaries do not ordinarily, and as

> mere cestuis que trustent, plan a common effort or enter into a combination for the conduct of a business enterprise. * * *But the nature and purpose of the cooperative undertaking will differentiate it from an ordinary trust. In what are called "business trusts" the object is not to hold and conserve particular property, with incidental powers, [23] as in the traditional type of trusts, but to provide a medium for the conduct of a business and sharing its gains. Thus a trust may be created as a convenient method by which persons become associated for dealings in real estate * * *.

The Court then went on to mention other forms of business enterprise in which the association might be used. It then pointed out that "The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity." "Mere formal procedure" was not to be made "a controlling test." The revenue act's definition embraces more than joint stock companies. And "while the use of corporate forms may furnish persuasive evidence of the existence of an association, the absence of particular forms, or of the usual terminology of corporations, cannot be regarded as decisive." Trustees may act as directors, and the trust terms serve as bylaws. Control by the beneficiaries, the Court pointed out, had in the earlier Hecht case been rejected as nonessential, and, hence, meetings of the beneficiaries were unnecessary, as

was likewise the transferability of beneficiary interests to constitute such a group an "association." The trust mechanism, the Court said, permitted the title to property to be held by a continuing body, with centralization of management, the ready transfer of beneficial interests without affecting the trust's continuity, the spread of these interests among many participants, and the limitation of the personal liability of the participant to the property embarked in the enterprise—all advantages which flow from the nature of trusts but approximate closely those afforded by the corporation. To insist on their nature as trust advantages would be to ignore the postulate that only those trusts were sought to be assimilated to corporations for tax purposes which "have the distinctive feature of being created to enable the participants to carry on a business and to divide the gains which accrue from their common undertaking * * *."

Having laid down these principles, the Court then proceeded to examine the facts of the case before it, of a trust created for the development of a tract of land by building golf courses, and club houses, surveying and selling lots, and the like, which was effected by issuing transferable certificates of beneficial interest. The Court thought it a business enterprise, even if no new tracts were acquired: "Its character was determined by the terms of the trust instrument. It was not a liquidating trust; it was still an organization for profit, and the profits were still coming in. The powers conferred on the

trustees continued and could be exercised for such activities as the instrument authorized."

The companion cases decided by the Supreme Court the same day dealt with situations not unlike that of the Morrissey trust. In Swanson's case, supra, a trust was created by two landowners, the trust res being an apartment house, and the assignable beneficial [24] shares, although originally divided among the landowners, were held in the taxable year by their wives. The Court held it an "association." In the Coleman-Gilbert case, supra, five coowners of about 20 apartment houses had conveyed them to trustees, with powers to improve, lease, and sell and to pay income to beneficiaries. The Court again held the trust an "association." In Combs's case, supra, the Court thought that a trust created to finance and drill an oil well, the beneficial interest certificate holders being 13 persons, was likewise an "association."

Further citations seem unnecessary in view of the fundamental test so clearly laid down by the Supreme Court. That is, whether there is a business purpose back of the trust's creation and continuance. A glance at the history of the present trust leaves no doubt that there was here such a purpose. James Porter and his wife owned certain agricultural lands in California and Minnesota, some of which were actively farmed. In 1930 they created a corporation and took its shares in exchange for these lands, the only other shareholders being Porter's two sons, daughter and son-in-law, and an

outside nominee. The use of the corporate form no doubt had its advantages, but it also had certain disadvantages from the standpoint of tax rates. In 1935 a trust was substituted for the corporation, taking over all its assets except the Porter Homestead, which apparently went to Porter's wife, for her name does not reappear among the holders of the trust's "expectancy fractions." The new trust beneficiaries are still the members of Porter's family, although their relative interests have changed somewhat since the corporation was dissolved. All these facts show, we believe, one increasing purpose to retain the advantages of centralized control, limitation of liability, and others associated with the corporate form in carrying on actively the business of farming lands and distributing the income therefrom.

We may stop a moment here to note those provisions of the trust to which petitioner points as distinguishing it from a business association. It is said that the trustees have exclusive management and may fill vacancies, and that the beneficiaries have no voice in the trust's control; that the trustees may not sell any interests in the trust estate and that the beneficiaries' interests are nontransferable; that the trustees have had no formal meetings and that the beneficiaries have never been consulted on the affairs of the trust. The claim of nontransferability of "expectancies" has not, we think, been clearly established. But we do not think these points are vital, for they go merely to the

outward form of the trust, which, on one side, may approximate the form of a corporation or, on the other, that of a strict trust; and it is not the particular form of doing business so [25] much as the business purpose which must determine. In other words, the statute is intended to hit a trust even strict in form if it is at the same time conducted for profit. Such is the teaching in Morrissey's case, as we understand it. Outside the statute's reach lie trusts created to safeguard and conserve the property of widows and infants, or to liquidate such property, the so-called "ancestral" trusts. Although the beneficiaries here were the members of Porter's family, there is no evidence to convince us that the trust's primary purpose was to hold the farms during the children's infancy or liquidate them in the process of administration. In so far as appears from the testimony, none of the children was an infant when the trust was created; and the only testimony pointing toward an intention to liquidate was Porter's rather vague statement that "we would have offered it [some of the trust lands] for sale or trade if we could get what we considered right for it." The family relationship of the grantors, trustees, and beneficiaries does not in itself establish the trust as "ancestral" or determine the category in which it should fall for tax purposes any more than it would affect the corporate character or tax classification of a corporation similarly constituted. That relationship is merely evidence of the purpose of the trust, which will weigh much or little, depending on other facts and circumstances. The other

facts here indicate a family corporation which it was thought could be operated as a trust under the so-called "Hulbert Plan", without paying corporate rates. In view of the principles later laid down by the Supreme Court, we think it unnecessary to discuss or attempt to distinguish the cases of Commissioner v. Guitar Trust Estate, 72 Fed. (2d) 544 (C. C. A., 5th Cir.), and Blair v. Wilson Syndicate Trust, 39 Fed. (2d) 43 (C. C. A., 5th Cir.), upon which petitioner relies. Active association of the beneficiaries together in creation of the trust is not an indispensable factor, as petitioner contends, in the creation of a business trust, especially where it is a family trust and the settlors are the father and mother; but if it should be thought so, we need look only beyond the creation of the trust to the prior corporation to find parents and children happily associated together under the form of a corporation in carrying on their farming operations. In the transmutations which followed it would seem of little moment that certain members of the family passed from the active role of shareholders to the passive one of beneficiaries.

We are of the opinion that petitioner was an association and therefore taxable as a corporation.

* * * * * * *

[26]

Decision will be entered under Rule 50. [28]

United States Board of Tax Appeals
Washington

Docket No. 95762

J. HOWARD PORTER, JOHN C. PORTER and PAUL D. PORTER, identified under the Trade Name PORTER PROPERTY TRUSTEES, LTD.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Memorandum Findings of Fact and Opinion Promulgated in the above entitled proceeding on September 5, 1940, counsel for respondent filed a computation for entry of deficiency on October 31, 1940, and on December 2, 1940, counsel for petitioner filed a computation of deficiency. Hearing under Rule 50 was held on December 18, 1940, at which time counsel for respondent filed an alternative computation of deficiency. Now, therefore, it is

Ordered and decided: That there is a deficiency in petitioner's income and excess-profits tax liability for the year 1935 in the amounts of $2,974.24 and $632.33, respectively.

(Seal) (Signed) JOHN W. KERN
Member

Enter:

Entered Mar. 5, 1941. [29]

[Title of Board and Cause.]

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH DISTRICT

To the Honorable, Judges of the United States Circuit Court of Appeals for the Ninth District:

I.

J. Howard Porter, John C. Porter, and Paul D. Porter, Trustees, identified as a Board of Trustees under the Trade Name Porter Property Trustees, Ltd., your petitioners, respectfully petition this Honorable Court to review the decision of the United States Board of Tax Appeals entered on the 5th day of March, 1941 and finding a deficiency in income and excess-profits tax due from your petitioners for the calendar year 1935, in the amount of $2,974.24 and $632.33 respectively.

Your petitioners are, and at all times mentioned herein have been, citizens of the United States, and the Trustee J. Howard Porter has at all times herein mentioned resided in Southern [30] California. The return of income tax in respect of which the aforementioned tax liability arose was filed by your petitioners with the Collector of Internal Revenue for the 6th California collection district, located in the City of Los Angeles, State of California, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Jurisdiction in this Court to review the decision of the United States Board of Tax Appeals, as

aforesaid, is founded on Section 100-3 of the Revenue Act of 1926 as amended by Sections 603 of the Revenue Act of 1928, 1101 of the Revenue Act of 1932, and 519 of the Revenue Act of 1934.

II.

Petitioners were appointed by their father and mother as Trustees of a Trust Estate on February 28, 1935. Said Estate consisted primarily of farm lands which had been owned by the father and mother for many years and which were now transferred to petitioners in trust for the five children of the grantors. The income in question for the calendar year 1935, and upon which the above mentioned deficiency is based was received by the Trustees from agricultural share rentals and oil and gas leases, all incident to the farm lands and real estate belonging to the trust Estate. The petitioners seasonably filed income tax return with the Collector of Internal Revenue for the 6th collection district of California, located in the City of Los Angeles, State of California, on Fiduciary Income Tax Return Form No. 1041 and 1041A, basing such filing upon the premise that they were trustees of a pure ancestral trust and therefore required to report the trust income upon such basis. [31]

The Board of Tax Appeals held:

(1) That the petitioners were an association and therefore taxable as a corporation.

III.

Assignment of Errors

In making its decision as aforesaid, the United States Board of Tax Appeals committed the following errors upon which your petitioners rely as the basis of this proceeding:

(1) The Board erred in finding that the taxpayers were an association and taxable as a corporation, since the evidence does not support such a finding.

(2) The Board erred in concluding that the petitioners were an association and therefore taxable as a corporation.

(3) The Board erred in finding that there is a deficiency in petitioners' income and excess-profits tax liability for the year 1935 in the amount of $2,974.24 and $632.33 respectively, or in any other amounts.

Wherefore, your petitioners pray that this Honorable Court review the decision and order of the United States Board of Tax Appeals and reverse and set aside the same and direct the said Board to enter its order that your petitioners were not an association and were, therefore, not taxable as a corporation, but on the contrary, that your petitioners were taxable as a pure ancestral trust and that there is no deficiency in petitioners' income and excess-profits tax liability for the year 1935; and for the entry of such further orders and directions as shall

[32] by this Court be deemed meet and proper in accordance with law.

BENJAMIN W. HENDERSON
Attorney for Petitioners
901 Civic Center Building
Los Angeles, California

State of California,
County of Los Angeles—ss.

Benjamin W. Henderson, being duly sworn, says: I am one of the attorneys for the petitioners in this proceeding. I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for the purpose of delay, and I believe the petitioners are justly entitled to the relief therein sought.

BENJAMIN W. HENDERSON

Subscribed and sworn to before me this 23rd day of May, 1941.

(Seal) JOHN F. POOLE
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: U. S. B. T. A. Filed June 2, 1941.

[33]

[Title of Board and Cause.]

STATEMENT OF EVIDENCE

The above entitled cause came on for hearing at Los Angeles, California, before the Honorable John W. Kern, member of the United States Board of Tax Appeals, upon the 20th day of September, 1939, and B. W. Henderson, Esq. and W. G. Edling, Esq. appeared on behalf of Petitioners, and John H. Pigg, Esq. appeared on behalf of Respondents. Thereupon, the following proceedings were had and the parties, by their attorneys, submitted the following evidence.

Thereupon, the Petitioners, to maintain the material averments of their petition, introduced in evidence a stipulation between counsel containing a partial stipulation of the facts in the case, which stipulation was accepted and made a part of the record. The said stipulation sets forth facts as follows:

The petitioners filed, within the time provided by law, an individual income tax return for the year 1935, under Title I of the Revenue Act of 1934, disclosing thereon a net income of [34] $7,192.38 and a tax liability of $337.31. No other return was filed by petitioners for the year 1935. (Stipulation p. 6, par. 9)

In his determination of the deficiencies involved in this proceeding, the Commissioner determined that petitioners are an association within the meaning of Sec. 801(a)(2) of the Revenue Act of 1934

and in explanation of such determination the following statement is contained in the deficiency notice.

> "It is held that your organization is an association within the meaning of sec. 901(a)(2) of the Revenue Act of 1934 and articles 901-2 and 801-3 of Regulation 86, and taxable as a corporation."
>
> (Stipulation, p. 6)

The trust agreement by which the petitioners herein were appointed as trustees was executed February 28, 1935 and was made part of said stipulation as Exhibit "A", attached hereto. (Stipulation, p. 3, par. 3)

Pursuant to the provisions of Article 15 of said Trust Agreement, and with the consent of James Porter and Katie E. Porter, (Tr. p. 2) the beneficiaries under said trust were named as follows:

Name	Expectancy Fractional Interest
Paul D. Porter	290/1000
John C. Porter	290/1000
Rebecca P. Wells	65/1000
Elizabeth P. Dennison	65/1000
J. Howard Porter	290/1000

(Stipulation, p. 4, par. 6)

The corpus of the trust estate as acquired February 28, 1935 consisted of assets from the James Porter Investment Company, a corporation, the same being principally agriculture [35] and unim-

proved land situate in Kern County and San Luis Obispo County, California, and Nobles County, Minnesota, (Stipulation p. 2, par. 2) and certain land contracts which had been acquired by the James Porter Investment Company in connection with sales of land.

The physical process by which the trustees came into title of the property was as follows:

On February 28, 1935, at the time the trust agreement was executed, James Porter and Katie E. Porter, husband and wife, delivered to the trustees 2408 shares of stock in the James Porter Investment Company out of a total of 2808 shares. The remaining 400 shares were held by Mrs. Katie E. Porter. On the same date the said 2408 shares of stock were surrendered by the said trustees to the James Porter Investment Company in exchange for all of the assets of that company, except one parcel of real estate situated in Grundy County, Iowa, known as the "Porter Homestead". Shortly thereafter the James Porter Investment Company was liquidated and dissolved. (Stipulation p. 4, par. 6)

The property which came into the hands of the trustees, as aforestated, was property which originally belonged to James Porter and Katie E. Porter, husband and wife, and which was transmitted to the James Porter Investment Company, a corporation, in exchange for its stock, at the time of its incorporation in 1930. Certain of the said lands had been improved and farming operations were carried on by lease tenants. [36] (Stipulation p. 2,

par 2) The entire outstanding capital stock of the James Porter Investment Company on February 28, 1935, and prior thereto, consisting of 2808 shares, was owned and held by James Porter and Katie E. Porter, husband and wife, their nominee and by members of their family.

The following tabulation shows:

(a) Names of stockholders of the James Porter Investment Company;

(b) family relationship of said stockholders;

(c) number of shares of stock held by each stockholder; and

(d) name and family relationship of two members of the Porter family who were not stockholders of the James Porter Investment Company on the date mentioned. (Stipulation p. 1, par. 1)

Name	Relationship	Number of Shares Held
James Porter	Father	685
Katie E. Porter	Mother	1,858
Paul D. Porter	Son	50
B. F. Shumway	Nominee for Father	65
W. M. Dennison	Husband of Daughter (Elizabeth)	50
Rebecca P. Wells	Daughter	50
James Howard Porter	Son	50
John C. Porter	Son	0
Elizabeth P. Dennison	Daughter	0
		2,808

Income to the trust was from farm rentals, from landowners oil royalties under oil and gas leases on the lands at the inception of the trust, and from interest on contracts receivable, likewise acquired.

The Exhibit referred to in the Stipulation, page 3, paragraph 3, as Exhibit "A" the same being a copy of the trust instrument dated February 28, 1935, is attached hereto and made [36A] a part of this statement of evidence.

JAMES PORTER,

witness called on behalf of the petitioners, being first duly sworn on direct examination, testified as follows, said testimony being set forth in narrative form:

I am past seventy years of age and live in Los Angeles, California with my wife, Katherine, or Katie Porter. We were married June 26, 1884 and have lived together as husband and wife since that time. We have five (5) children: John C. Porter, living at Weyburn, Saskatchewan, Canada; Paul D. Porter, living at Waterloo Iowa; Mrs. W. M. Dennison, living at Cedar Rapids, Iowa; Rebecca Wells, living at Detroit, Michigan; and Howard Porter, living at Los Angeles, California. At the present time I am retired. My previous occupation was banking, lumbering, and operator of agricultural lands and farms. On February 28, 1935 I remember signing a certain trust agreement wherein James

(Testimony of James Porter.)

Howard Porter, John C. Porter, and Paul D. Porter were made trustees and identified under the Trade Name Porter Property Trustees, Ltd. Before signing this instrument I did not have any conversation with anyone concerning the same, except with my wife. As far as our problem was concerned, that had been under our consideration for years, but as far as the immediate trust was concerned, that was first discussed along about the beginning of 1935 here in California. No one else except Mrs. Porter and myself was present at the time we discussed this matter. (Trans. pp. 14-18)

This was a problem of Mrs. Porter's and myself regard- [37] ing the distribution of the property we had to the family. We wanted to establish an equitable arrangement, an arrangement that we could feel entirely satisfied as to the equitability of it and the safety of it. One of the problems in this for us was that we had a son who was subject to the liquor habit, and to give him property or money was not a safe thing or proper thing to do. When this trust was laid before me it appeared to me immediately that there was a safety there for this son. I took it home and Mrs. Porter and I considered it together. It appealed to us as being a very convenient way whereby to distribute it equitably to the family and with this safety idea in reference to which I have already mentioned—this son's safety. Therefore, immediately we began operations in that direction. I had not discussed this proposition with

(Testimony of James Porter.)

any one of our children, but had consulted with John M. Dennison, my attorney at that time. Mrs. Porter and myself requested, or ordered, that the instrument which we signed be drawn and prepared. After the instrument was prepared for us, Mrs. Porter and I signed it here in Los Angeles. We then requested that James Howard Porter, John C. Porter, and Paul D. Porter act as trustees, but we did not make this request until after the instrument was actually prepared and we had signed it ourselves. (Trans. p. 21) Mrs. Porter and I at the same time signed an order to register our five children as beneficiaries under the terms of this trust. It was our thought to in this manner equitably distribute our property that was going into this trust among our five children. We did it for our children because we thought it was the best way to do it. (Trans. p. 22) [38]

[Clerk's Note: The following is the question and answer testimony of James Porter as narrated above, and inserted at the request of counsel for the petitioner.]

By Mr. Henderson:

Q. Now, Mr. Porter, do you recall on or about February 28, 1935, of signing a certain trust agreement wherein James Howard Porter, Paul D. Porter and John C. Porter were made trustees and identified under the trade name of Porter Property Trustees?

(Testimony of James Porter.)

A. I do remember signing that; yes, sir. [1]

Q. And before signing this instrument, do you recall having had any conversation with anyone concerning the same?

A. No, only except my wife.

Q. Did you have some conversation with her regarding entering into a trust arrangement?

A. I did; yes, sir.

Q. About when did this first conversation occur?

A. As far as the problem was concerned, that had been under consideration for years; but as far as the immediate trust was concerned, that was along about the beginning of the year 1935.

Q. It was at a time when you and Mrs. Porter were both here in California?

A. Yes, sir.

Q. At these conversations when you discussed this matter with Mrs. Porter, that is, when you discussed the general problem, as you referred to it, with Mrs. Porter, was anyone else present other than yourself and Mrs. Porter? A. No, sir.

Q. You just discussed it between yourselves?

A. Yes, sir.

Q. At the time you first talked to Mrs. Porter early in 1935 regarding this particular trust arrangement, was there anybody present besides yourself and Mrs. Porter? [2]

(Testimony of James Porter.)

A. No, sir.

Q. Now, will you state your conversation—that is, as best you can remember it—with Mrs. Porter regarding this general matter prior to the time you talked of this specific trust arrangement?

Mr. Pigg: Your Honor, may I inquire of counsel at this point the purpose of this question?

Mr. Henderson: My purpose in these questions which are, to this point, more or less preliminary, is to develop testimony as to the purpose, as discussed, as talked back and forth by Mr. and Mrs. Porter, for entering into the trust agreement which was entered into, which is the basis of this proceeding.

The Member: How is that relevant, counsel? We are interested in what kind of a trust it is, and not particularly the purpose of the trust, the reason for the existence of it.

Mr. Henderson: That is true to this extent: However, the purpose of entering into the agreement, I contend, is material as to the trust itself. That is, while the powers of the trustees and grants of property as stated in definite terms, the purpose of the testimony is certainly grounds, or is a subject to be gone into at this time to establish whether or not—as to help establish whether or not——

(Testimony of James Porter.)

The Member (Interrupting): There may be a background [3] to be used in the interpretation of the trust itself and the powers granted. With that exception, I don't see how it would be relevant.

Mr. Pigg: Your Honor, of course, now the question is whether the petitioner is or is not a business trust or an association within the meaning of the statutes. The Supreme Court has said its character must be determined by the trust instrument itself.

Now, I want to object to—reserve rights for the respondent to object to any testimony of this witness offered for the purpose of explaining or attempting to show, what the parties desired to do, or what they desired not to do, as well as what they agreed to do.

The Member: Go ahead.

By Mr. Henderson:

Q. You may answer the question.

A. Will you please repeat it? I have forgotten what it is.

Q. Will you state the conversation that you had with Mrs. Porter relative to entering into a trust arrangement plan prior to the execution of this trust?

A. This was a problem of Mrs. Porter and myself regarding the distribution of the property we had to the family. We wanted to es-

(Testimony of James Porter.)

tablish an equitable arrangement, an arrangement that we could feel entirely satisfied, the [4] equitability of it, and the safety of it.

One of the problems in this for us was that we had a son who was subject to the liquor habit, and to give him property or money was not a safe thing or proper thing to do.

When this trust was laid before me it appealed to me immediately that there was a safety there for this son. I took it home and Mrs. Porter and I considered it together. It appealed to us as being a very convenient way whereby distribute it equitably to the family, and with this safety idea in reference to what I have already mentioned, this son's safety. Thereafter, immediately we began operations in that direction.

Q. Now, did you, prior to the time this instrument was signed, talk to any of your children regarding the establishment of a trust or otherwise distributing property to them?

A. No, sir, I had not discussed it with any one of them.

Q. With whom did you consult on that proposition at that time?

A. Well, the trust, as it was finally set up, was submitted to me by Mr. Parkinson.

Q. Did you also consult with your attorney, Mr. Dennison? [5]

(Testimony of James Porter.)

A. I consulted with my attorney at that time, Mr. John M. Dennison.

Q. Referring to the trust instrument itself which you signed and which counsel has stipulated as having been executed and copies furnished, referring to the instrument itself, who requested or ordered those instruments to be drawn as prepared?

A. Mrs. Porter and myself.

Q. At the time you signed those instruments, were any of your children, other than Howard Porter, in Los Angeles?

A. No, sir, they were not.

Q. Will you state, Mr. Porter, just what you did in executing—that is, you and Mrs. Porter—in signing that instrument, and then having others sign it, or procuring the signatures of other signers thereto?

A. Well, it was drawn and we signed it, and I believe there was another party signed with us.

Q. You and Mrs. Porter signed it here in Los Angeles? A. Yes, sir.

Q. After you signed this instrument, did you then advise or tell the children what you had done? A. No, sir, I did not.

Q. That is, did you then tell them that you had signed a trust instrument after you and Mrs. Porter had [6] signed it?

A. Later on, perhaps I did.

(Testimony of James Porter.)

Q. And after you and Mrs. Porter signed the trust instrument, did you then request the trustees who signed the instrument as trustees, to-wit, James Howard Porter, Paul D. Porter and John C. Porter, to act as trustees in this matter? A. I did.

Q. But had you requested them to act or informed them you were signing this instrument prior to the time you actually had the instrument prepared and signed it yourself?

A. I did not; everything was done.

Q. Now, Mr. Porter, I show you a signed page or document here entitled "Instructions to Register Beneficiaries," and a copy which has been stipulated to, and a copy which appears in the copies furnished, and ask you if the signature attached here in the lower left-hand corner, James Porter, is your signature?

A. (Examining document) Yes, sir.

Q. And the signature of Katie Porter is the signature of your wife?

A. (Examining document) Yes, sir.

Q. Is that the document which you signed at the time of the creation of this trust wherein you designated the five children, Paul D. Porter, John C. Porter, James Howard Porter, [7]

Elizabeth P. Dennison and Rebecca Wells as beneficiaries under the terms of the trust?

A. (Examining document) That is it.

(Testimony of James Porter.)

Q. Was that designation done as stated in this particular instruction for the purpose of equitably distributing the property that was going into these trusts among the beneficiaries?

A. It was our thought.

Mr. Pigg: I object and move to strike the answer because it is immaterial. The instrument itself describes and designates exactly how these beneficial interests were to be determined.

The Member: The Witness said he did it for his children, because he thought it was the best way to do it.

Any other questions of this witness?

Mr. Henderson: Just one moment, your Honor.

The Member: We will take a short recess, gentlemen.

(At this point a short recess was taken, after which proceedings were resumed, as follows:)

The Member: All right, gentlemen.

By Mr. Henderson:

Q. Mr. Porter, what is your present occupapation? A. Well, I guess I am retired.

Mr. Henderson: That is all.

Cross Examination

* * * * * *

[8]

The three trustees were chosen by myself and Mrs. Porter, and it is appealing that Howard Porter was considered the logical one to look after the

(Testimony of James Porter.)
business interest of the trust and its property. My confidence was placed in all three of the named trustees, and insofar as I know they have carried on in accordance with the terms of the trust instrument. I haven't followed it up very closely myself, but I think it has been carried on right. I have had really nothing to do with it since its inception. (Trans. p. 27)

JAMES HOWARD PORTER,

a witness called on behalf of the petitioners, being first duly sworn, on

Direct Examination

testified as follows, said testimony being set forth in narrative form:

My name is James Howard Porter; I am also known as J. Howard Porter. I am thirty-one years of age and am actively engaged in property management. I am a son of James Porter and Katie E. Porter. I remember signing the trust agreement of February 28, 1935, wherein I, together with John C. Porter and Paul D. Porter, were appointed as trustees and which Board of Trustees is known under the identifying name of Porter Property Trustees, Ltd. Prior to this date my father or mother hadn't discussed the arrangement with me. I knew there was something going on but I didn't know exactly what it was. They had not discussed any details with me in connection with the matter

(Testimony of James Howard Porter.)

at [39] all. My father and mother requested me to act as a trustee in connection with this matter and I did not know about it until the trust instrument was presented to me at the time it was signed. So far as I know they had not previously discussed this matter with either of the other trustees. I consented to act as a trustee and have been actively in charge of the property with this trust since that time. The other trustees have also paid some attention to the property. We have kept financial records showing income and disbursements and my activities in connection with these trust properties have taken only part of my time. The trustees have never held any formal meetings. I see the other trustees from time to time as I travel around or as they come here. I just lease the property to tenants and when I see the other trustees I tell them what I have done. As to property that is near them, we discuss what they should do to take care of it and that is the way it is handled. Our records are kept here in Los Angeles. We have never held any meetings with the beneficiaries, or advised with them in connection with the conduct of the affairs of this trust. They have not given us any advice or suggestions, and they know nothing about it. We have made some distributions to the beneficiaries under the terms of the trust. The property belonging to the trust is practically all farm land, and some of the land is being farmed by lease tenant farmers under terms of leases which we give

(Testimony of James Howard Porter.)

them. We do not actually farm any of the property ourselves, either as individuals or as trustees. In other words, whatever farm [40] property is farmed is operated by tenants on a lease basis, and we collect whatever rents are due and accruing from these lease tenants. (Trans. pp. 28-34)

We have attempted to get offers for the sale of part of this property through different real estate agents, and through individuals but we have not been able to sell any of the said land. Farm lands have been rather distressed and we haven't made a definite offer of sale. We would have offered it for sale or trade if we could get what we considered right for it. We have attempted to get offers. (Trans p. 35)

[Clerk's Note: The following is the question and answer testimony of James Howard Porter as narrated above, and inserted at the request of counsel for petitioner.]

The Witness: James Howard Porter.

Direct Examination

By Mr. Henderson:

Q. Mr. Porter, are you also known as J. Howard Porter?

A. Yes, sir, most of the time.

Q. And you signed yourself by that signature? A. Yes, sir.

Q. Very much of the time? A. I do.

Q. Where do you live, Mr. Porter?

(Testimony of James Howard Porter.)

A. Bakersfield.

Q. How old are you? A. Thirty-one.

Q. What is your occupation?

A. Property management, I guess.

Q. And you have lived in California since when? A. January 1935.

Q. And you are the son of James Porter and Katie E. Porter? A. I am.

Q. Mr. Porter, do you recall a certain trust agreement having been entered into on or about February 28, 1935, wherein yourself, John C. Porter and Paul D. Porter were appointed as trustees, and which is known under an [9] identifying name as Porter Porperty Trustees, Ltd.? A. I do.

Q. Do you recall the occasion upon which you signed that instrument?

A. Yes, I remember it.

Q. You read that instrument before you signed it, I take it? A. Yes, sir.

Q. Now, prior to the time that you read the instrument, had your father discussed—that is, your father or mother, or either of them discussed with you about going into a—or establishing a trust arrangement of any kind?

A. No, they really hadn't discussed the arrangement with me. I knew there was something that was going on, but I didn't know exactly what it was.

(Testimony of James Howard Porter.)

Q. That is, they didn't discuss any details or take you into their confidence in connection with that matter? A. No, sir, not at all.

Q. Then what was the first direct knowledge that you had that this particular trust arrangement was being entered into?

A. The exact trust arrangement?

Q. Yes.

A. In February 1935. [10]

Q. Was it at the time the instrument was presented to you? A. Yes, sir.

Q. Who asked you or requested you to act as a trustee in connection with this matter?

A. My mother and father.

Q. Was that at the time when the instrument was shown to you? A. Yes, it was.

Q. Did you consent to act as a trustee?

A. I did.

Q. Do you, of your own knowledge, know whether or not the other trustees, to-wit, Paul D. Porter and John C. Porter, had been requested to act in the capacity of trustee prior to the time that you signed the instrument?

A. No, they didn't know about it, as far as I know.

Q. At the time you signed the instrument, was there a signature attached thereto as trustee, that is, the signature of John C. and Paul D. Porter?

A. I don't remember just who signed first.

(Testimony of James Howard Porter.)

Q. Do you remember whether or not your mother and father had already signed the instrument at the time you first saw it?

A. I just don't remember the order of the signatures.

Q. Now, Mr. Porter, you have acted as trustee in this [11] trust since the time of its inception, that is, February 28, 1935, have you not? A. I have.

Q. And you have been actively in charge of the property in this trust since that time?

A. Yes, sir, I have.

Q. The other trustees have also paid some attention to the property, I take it?

A. Oh, yes.

Q. Now, you are acquainted with the records of the trust, are you? A. Yes.

Q. Do you keep financial records—that is, records showing your cash transactions?

A. Showing income and disbursements?

Q. Yes. A. Yes, sir.

Q. You have such records kept for you?

A. Yes, sir.

Q. By the way, Mr. Porter, do you manage other property other than the property involved in this particular trust that we are now considering? A. I do.

Q. So that your activities in this trust only consume a part of your time? [12]

(Testimony of James Howard Porter.)

A. That is right.

Q. Now, do you know whether or not any certificates or writings of any kind have been issued or made by the trustees and forwarded to the beneficiaries showing their interest in this trust?

Mr. Pigg: Your Honor, I will have to object to that question on the ground, first, of its incompetency, secondly, that the trust instrument itself describes precisely how the beneficial interests of this trust shall be designated—created and designated and thereafter known; and it is also immaterial because the instrument itself shows on its face not only what the beneficial interests were, but it shows exactly who were the owners of those beneficial interests.

The Member: Overruled.

Mr. Pigg: Exception.

The Member: Exception noted.

The Witness: Could I have the question?

The Member: The question was, Was there any certificates issued to the beneficiaries?

The Witness: No, there is no writing from the trustees to the beneficiaries whatsoever.

The Member: All right.

By Mr. Henderson:

Q. Now, in the conduct of the affairs of this trust, have you held formal meetings with the trustees? [13]

(Testimony of James Howard Porter.)

A. No, no formal meetings. I just see the trustees as I travel around, or they come here.

Q. State briefly how you conduct the affairs of the trustees; that is, is it done by formal resolutions, or just how?

A. No, sir, it is not done by any resolutions. I just lease the property, and when I see the other two trustees I tell them what I have done. If there is anything—that is, a property near to them, we discuss what they should do to take care of it, and that is the way it is handled.

Q. Do you keep your records as to accounting? A. Yes, sir.

Q. In all cases?

A. Yes, sir; they are kept here in Los Angeles.

Q. Now, have you, since the inception of this trust, held any meetings with the beneficiaries?

A. No, sir.

Q. Or have you called upon them for advice in connection with the conduct of the affairs?

A. Not at all.

Q. Or have they suggested or given you any orders in connection with the affairs of the trust at any time?

A. No; they know nothing about it.

Q. You have made some distributions to the beneficiaries under the terms of the trust, have you not? [14] A. We have.

Q. Now, referring to the property which is

(Testimony of James Howard Porter.)

the corpus—or property belonging to this particular trust, will you state generally the nature of such property? What kind of property is it?

A. It is practically all farm land.

Q. Are some of those lands under farming activities? A. Yes, sir.

Q. How do you, as trustee, handle those particular activities?

A. Through leases to tenant farmers.

Q. Do you operate any of that property yourself? A. (Pause)

Q. That is, do you actually farm any of that property yourself as an individual or as a trustee? A. No, sir.

Q. In other words, whatever farming property that is operated is operated by leased tenants? A. Yes, sir; that is it.

Q. Do you collect whatever rents are due and accruing from those lease tenants?

A. That is right.

Q. Now, have you made any offers to sell any part of this property during the time that you have had it under supervision in this trust?

[15]

A. We haven't made a definite offer.

Q. Have you offered it for sale or trade?

A. We would have offered it for sale or trade if we could get what we considered right for it.

Q. What has been the condition as to obtaining an offer of sale during this time?

(Testimony of James Howard Porter.)

A. Well, farm lands have been rather distressed and we considered we couldn't get near what the property was worth.

Q. Have you attempted to get any offers on any part of it? A. Yes, sir, we have.

Q. That has been through different real estate agents whom you have contacted trying to get offers for sale?

A. That is right, and other individuals also besides real estate men. [16]

Cross Examination

My occupation or business is that of property management. A portion of my duties in that respect pertain to the properties owned by the petitioners in this case. I am president of the Board of Trustees and I am more active in the management of the trust property than the other trustees. I, together with the other trustees, manage the property pursuant to the terms of the trust, and it happens that I am the more active. As part of my duties I recommend and attempt to make those leases that would be profitable and I take such action as is necessary to enter into such leases for the benefit of the trust. I attend to other business affairs of the trust, such as seeing that collections are made and that obligations are paid, and maintain a set of books of account which reflect our financial condition. We have a bookkeeper to take care of the

(Testimony of James Howard Porter.)

books. The business and affairs of the petitioners, which consisted of leasing of [41] lands and collecting the rentals thereon, were carried on during the year 1935 in accordance with the terms of the trust instrument to the best of our ability. We attempted in any event to do that.

Petitioners, J. Howard Porter, John C. Porter, and Paul D. Porter, identified under the Trade Name Porter Property Trustees, Ltd., tender and present the foregoing as their Statement of Evidence in this case and pray that the same may be approved by the United States Board of Tax Appeals and made a part of the record in this case.

BENJAMIN W. HENDERSON
Attorney for Petitioners [42]

"Hulbert Plan"

CONVEYANCE AND CONTRACT

Whereby to Establish (not create) Property in Absolute Ownership in Natural Persons, Who, for Convenience, Use a Trade Name (to be proprietary without creating a fictitious entity) Common to Them as a Board; Requiring Strict Accounting; Proclaiming the Limits of Their Financial Liability; Accepting Notice of Injunction; Providing for Succession and Continuity of Trustees; Regarding as Sacred Their Contract Obligations Assumed in Good Faith; Agreeing to Administer for

Conservation and to Fairly Apportion in Distributions; and in All Acting as Citizens May Under Common Law Rights of Contract and Federal Enactments Vouchsafed Since the Adoption of the Constitution of the United States of America and the Amendments Thereto, and Hereby Said Trustees Become Sole Owners of an Estate With No Restraints on Powers of Alienation.

(Copyrights, Hulbert Publishing Co., Chicago, Ill. 1935).

Trade Name to Identify Board: Porter Property Trustees, Ltd.

Executive Offices In: Minneapolis, Minnesota.

CONVEYANCE

and

CONTRACT OF ADMINISTRATION

This Four Part Instrument, Made this 28th day of February 1935, is executed as to parties and subject matter, as follows, to-wit:

The Parties hereto are hereby designated as Two Groups, namely: The Grantors who appoint the hereinafter named Trustees and who Convey and Grant unto them Property which is Not described herein; and The Trustees who Accept their Appointments, who Accept the Property, and who then enter into a Contract containing Articles of Administration as between themselves.

Witnesseth:

APPOINTMENT OF TRUSTEES

James Porter, Katie E. Porter, Paul D. Porter, B. F. Shumway, W. M. Dennison and James Howard Porter, all citizens of the United States, herein designated as Grantors, hereby select and appoint [43] James Howard Porter of Los Angeles, California, John C. Porter of Canada, and Paul D. Porter of Waterloo, Iowa, Trustees, who, with possible Associate and/or Successor Trustees, are, by virtue of this instrument and for convenience in collective holding and bargaining and in their discretion, to act under and use the identifying and Trade Name of

Porter Property Trustees, Ltd.

CONVEYANCE

For and in consideration of the objects and Purposes herein set forth, the cash sum of Ten and no/100 Dollars in hand paid, and other considerations of value, the receipt of which is hereby acknowledged, the said Grantors do hereby make, constitute and appoint the above named and designated Trustees, and their possible associate and/or successor Trustees, to be and they are hereby made in fact Absolute and Exclusive Owners, in their discretion to act under their designated Trade Name as such Or in their individual names collectively, and do hereby sell, assign, transfer, convey and deliver unto said Trustees, and unto their possible

associate and/or successor Trustees, rights and certain Property—with power of sale and full power to convey—to constitute the initial Estate, which shall and is hereby made to include and comprise Certain Personal Property of value, particularly described in schedules and inventories by the Grantors this day delivered to and now held by the said Trustees, and inventories they may make from time to time, but with the understanding that no existing liens or obligations attached to the property or any part thereof shall be assumed as financial obligations against the Estate Corpus, except as the Trustees may expressly specify in writing.

ACCEPTANCE

The said Trustees, for themselves and possible associate and/or successor Trustees, do hereby Accept their appointment and their Offices of Trustees and do hereby Accept the above referred to Personal Property, duly conveyed and delivered, agreeing to Conserve the Estate, to handle and barter, manage and administer it and such accretions thereto as may in future accrue, both real and personal, and in their judgment and discretion, to the best of their ability and as they interpret the meanings, purposes and obligations herein expressed, to carry out the spirit, tenor, intentions and purposes herein set forth, subject to the following Articles of Covenant, to-wit:

CONTRACT CONTAINING ARTICLES OF ADMINISTRATION

Each Trustee hereinbefore designated, for self and for possible associate and/or successor Trustees, hereby covenants and agrees with the other Trustees in Articles of Administration, to-wit:

Art. 1. Board of Trustees: The Trustees shall be construed to [44] Be the Absolute and Exclusive Owners of the Legal and Equitable Title to all Property, real and personal, in the Estate, having powers including the Power of Sale and the Right and Power to Convey and to Deliver any and/or all such Estate Property at will, and assuming as such Trustees the obligations of Administration to which they have voluntarily subscribed.

The Trustees hereunder and as they may change in personnel, as provided herein, shall, in their collective capacity, be construed to be the Board of Trustees, The Board of Trustees shall not at any time exceed Five in number, and the Trustees herein named, associate Trustees they may elect or appoint to increase their Board, and possible successor Trustees, from time to time elected or appointed to fill vacancies as they may occur, shall hold their Trusteeship and Property Ownership in continuity, for the full life or term of this contract, unless removed by death, resignation, court order or a majority vote of their Board Members for incompetence, fraud or gross neglect hereunder. Whenever vacancies occur the remaining Trustees

may continue alone Or they may elect New Trustee or Trustees to fill vacancies, and should the entire Board be vacated a Court of Equity may appoint Trustees. Whenever any such newly elected or appointed Trustee or Trustees shall have formally accepted such election or appointment the Legal and Equitable Title to the Estate Properties, real and personal, shall rest in the New together with the continuing Trustees in continuity, (Not As Tenants In Common) and without any further act or conveyance. All resignations, removals, elections and/or appointments, and records of any deaths of Trustees, pertaining to Board Membership and Property Ownership shall be inscribed in the records of the Board of Trustees.

Art. 2. Board Acts and Meetings: The Trustees may act together informally over their individual signatures or in their Trade Name through duly authorized Officers of their Board. Names of Officers, duties, appointments and authority delegated shall be duly described and inscribed in their Office Records, and the individual Trustee hereby agrees that the Board may authorize and delegate to, by proper resolution, any member or members of the Board of Trustees, the necessary authority to transact any and all business of the Trustees, including that which is necessary or incidental to the execution of deeds, conveyances and other instruments in writing on behalf of the said Trustees.

They may, by unanimous resolution, provide for holding periodical meetings without notice, and

special meetings may be called at any time by a majority Or officials giving Five days written Notice to each Trustee. At any such regular or special meeting a majority of all the Trustees then constituting the Board shall constitute a quorum to transact business, their acts to be final unless an absent Trustee shall file a protest in writing with the Board Secretary within Five days after receiving notice of such enactment. Such protest can be set aside or overruled by a majority of all the Trustees then constituting the Board of Trustees.

Art. 3. Powers: Being Natural Persons these Trustees, their associate and/or successor Trustees, shall organize themselves into a Board, and may do collectively, in their discretion, any lawful [45] things which citizens may lawfully do in any or all States unless herein limited. (It should be remembered: "Corporations possess only the powers granted to them by law, while individuals possess all powers except those prohibited by law.") They may own real estate or personal property in any State without limit, may buy, sell, improve, exchange, assign, Convey and deliver, may grant Trust Deeds and may mortgage or otherwise encumber for obligations; may own stock in or entire charters of corporations, and may engage the Estate funds and properties in any industry or investment in their discretion, hoping thereby to make gain to the Estate. They may delegate authority at will and Resolutions of their Board

recorded in Minutes of their meetings shall be good and sufficient evidence of their intentions and that their acts are within their powers, discretion and authority to perform.

Art. 4. Trade Name and Seal: The trustees may and hereby do, without actual or pretended creation of a fictitious name, thing or condition, for convenience in collective holding and bargaining, adopt and use a Trade Name and common seal, for the purposes of identifying them collectively and as a Board, the style, design and manner of use of each being shown in the final execution of this instrument. The appearance of the Trade Name shall be construed to refer directly to the Natural Persons comprising this Group or Board and authorized to serve as Trustees hereunder. The form used herein in the final execution of this instrument is cited as a good form to follow when Trustees execute contracts and conveyances in their Trade Name, under Seal and in their Board capacity and indicates properly delegated authority. The Trade Name established hereby is a property possessed and owned by the Board of Trustees.

Art. 5. Administration Rules: The Trustees may regard this instrument as their sufficient guide, supplemented by resolutions of their Board written into their office records to cover contingencies from time to time, or they may adopt formal by-laws or rules of business conduct when expedient, which shall be considered binding upon all Trustees and which may or may not be published.

Art. 6. Board Officials: It is advisable to elect a presiding officer and to select and appoint a Board Secretary and/or other officials, to delegate duties and authority, and some Bank may be chosen as a depository, stipulating as to who may sign checks. This Board has selected and authorized its Board President and a Secretary, as shown in the final execution of this instrument, who are subject to changes in personnel in the discretion of the majority of the Trustees from time to time, and as shown in their records, wherein is also shown the degree of authority delegated to each officer in their Board and the location of the Board office and any changes from time to time shall be recorded therein.

Art. 7. Compensation: The Trustees shall fix and pay all compensation of officers, agents and employees in their discretion, and may pay to themselves as Trustees such reasonable compensation as may be determined by a regular act of their Board. Special attention is called to State and Federal regulations in the matter [46] of employing and paying labor, to which these Trustees shall conform.

Art. 8. Records: The Trustees shall keep a faithful record of all important transactions, inventories of all Estate properties, account of receipts and disbursements, name and address of each known beneficiary, indicating therewith comparative ratios or fractions of expectancy; such general records, although private, to be available for examination of interested parties upon court order or reasonable demand.

Art. 9. Property Holdings: Legal and Equitable Title to all Property in the Estate, real and personal, shall rest in the Trustees—members of the Board of Trustees as they appear in continuity, from time to time, in or identified by their Trade Name or in their individual names collectively, the residue to inure to survivors in their Board, and unaffected by death of any member, with power of sale and power to convey and deliver, and in confident expectation that their administration shall be in good faith.

All income and estate funds, when collected or paid over to the Trustees, shall be construed to be part of the Estate Corpus from which the Trustees pay obligations, reinvest and/or distribute, in their discretion.

Art. 10. Personal Liability Limitations: These Trustees will follow precedent usual to acts of executors or Trustees of property established with them by will or otherwise, assuming as such Trustees only such obligations attached to the property they acquire as they particularly agree to assume, or resultant from their administration, and then only to the extent and value of the Estate funds and properties, but not personally to jeopardize their personal or separate holdings or property of other Estates they may help to administer.

Art. 11. Publication of Notice: Filing this instrument in the public records of some County named and duly referred to shall be constructive Notice to the World of the specific personal liability limitations stipulated, and all persons, corporations

or companies extending credit to, contracting with or having claims against the Estate or Trustees as the Owners thereof must look only to the funds and properties of the Estate for payment or discharge of obligations. To this constructive notice the Trustees should supplement actual notice in writing contracts. The "LTD." which appears in the Trade Name is a reminder to the "World" of "Limited Liability" of Trustees.

Art. 12. Fiscal Reports: The fiscal year of the Trustees shall end on the last day of each calendar year, at which time they should compile the annual summary of their records, disclosing assets and liabilities, receipts, disbursements and balance of funds carried, comparative profits and loss, with net inventories from which to render lists and financial statements; Summaries may be given to each beneficiary of record, read at their meetings or otherwise published for information.

Art. 13. Beneficiaries Meetings: The Trustees may, in their discretion, call the beneficiaries to meet annually or at other [47] times, to hear and discuss reports and forecasts, and while they may adopt resolutions of protest or commendation, no act of the beneficiaries as such shall be mandatory nor to justly question rights of the Trustees to exclusively manage the business affairs and control the Estate funds and properties.

Art. 14. Distributional Accounting System: In the "Hulbert Plan" there is no issue and sale of paper shares under that or any other name or pre-

tense, nor any sale of interests in or fractions of the Estate; merely the expectancy thereunder being divided into fractions, and gross number and nominal or name value of each being predetermined and designated in this contract and in entries in the register which is used to list beneficiaries; such gross number and name value never to be increased or changed. These fractions allotted as to beneficiaries in the register shall be the guide enabling the Trustees to properly apportion each distribution and the summary thereof shall not be construed to be an index to the intrinsic values of the Estate.

Art. 15. Registration & Dormant Fractions: Expectancy Fractions under this administration shall at first be allotted in the records of the Board under instructions delivered to the Board by James Howard Porter. Should fractions appear dormant thereby, while held dormant they shall not be reckoned with when apportioning in distributions, such being computed solely by or upon the fractions registered as to beneficiaries at time of making each distribution. Dormant fractions, their usefulness being contingent upon possible future conveniences, remain subject to the discretion of the Trustees.

Art. 16. Beneficiaries: The Trustees shall duly register every known beneficiary hereunder, devoting to each a separate entry in their special register of beneficiaries. A beneficiary shall be construed to be as one who tenants property, subject to and without affecting the discretion, management and/or absolute ownership of the Trustees in whom legal and equitable title to all Estate properties are

vested. Death of a beneficiary shall not entitle the legal heirs or representatives to demand any partition of or interest in or distribution from Estate funds and properties, but the legal heirs may succeed to the expectancy as of a decedent upon receipt by the Trustees of satisfactory information. The Trustees, thereupon, shall cancel the obsolete entry in such register and make new entry or entries therein for heirs of the deceased as new beneficiaries and permit such new beneficiaries thereafter to be duly considered when making subsequent distributions while they are so registered. Changes in beneficiaries from any cause shall be duly noted by the Trustees, who shall correct their register accordingly. Corrections shall be made in the register by canceling the obsolete and making new entry or entries of record, and subsequent distributions shall be apportioned according to the changed register.

Art. 17. Distribution of Avails: The Trustees may at any time in their discretion and from any available funds in the Estate, make partial distributions and, ultimately, upon closure of the Estate, shall distribute the entire residual funds; all distributions to be apportioned to beneficiaries of record according to [48] the number of fractions of expectancy appearing as credited to each as compared with the total number of fractions credited as to all registered beneficiaries only, and without regard to any dormant fractions.

Art. 18. Duration: Because rules against unlimited succession provoke eventual closure of this contract and Estate Holding as a safeguard these

Trustees adopt the following: This contract and succession of Trustees and Property Holdings hereunder may continue indefinitely during any lawful term, in the discretion of the Trustees, Except that no suspension of title or restrants upon alienation, should either arise hereunder, shall continue beyond the legal term as at present provided therefor in the individual States where the Trustees are or may become active.

Art. 19. Method of Closure: At time of closure the then acting Board of Trustees shall proceed to liquidate all of the assets, pay off all debts or should funds be insufficient, pay all in equal ratio, and shall distribute any net residue to beneficiaries as provided; When such final distribution shall have been made and a Notice to that effect is filed for record wherever this original instrument was previously recorded, announcing final closure, this Estate Holding shall cease and determine and the Trustees shall be automatically discharged; Provided, however, that any dissatisfied creditors may immediately invoke the good offices of a Court of Equity to review the settlement and approve the same or order adjustment of any error, tort or unfairness.

Art. 20. Injunction—Limitations: The Trustees are hereby enjoined to refrain from any actual or pretended issue or sale of capital stock in or of their Estate, such being a corporation prerogative; nor shall they issue or sell shares, equities, units, fractions or undivided interests, legal, beneficial or equitable, in the Estate, either of which would be

prejudicial to purity of Estate Holding and in contravention of the fundamentals of the "Hulbert Plan of Property Administration" herein employed and adopted.

The Trustees shall not construe Expectancy Fractions, herein provided, to be property of which they are capable of making gifts or sales, nor is it possible to issue, offer for sale, or sell such Expectancy Fractions, they being provided for the convenience of the Board in accounting and apportioning in distributions, and do not express or imply property or property rights of any nature.

Art. 21. Amendments: While Conveyance and Delivery of Properties herein described and referred to is irrevocable, should any part or portion of these articles of covenant, whatsoever, be construed by any Court to be contrary to or in contravention of law, it is the purpose and intention of all parties hereto, that in so far as this Conveyance and Contract is legal it shall continue in full force and effect and the Trustees shall operate thereunder. These Articles of Covenant for formal administration may be altered and/or amended at any time by the full membership of the then acting Board of Trustees jointly executing and attaching an appendix hereto, a [49] copy of which with due reference hereto should be recorded in public records wherever this original instrument was previously recorded.

Art. 22. Taxation — License: These Trustees, being Natural Persons, have the constitutional right to transact business in any or every State free from

requirements imposed upon artificial entities, but should the Trustees engage in a licensable occupation, they, like other citizens, should and must procure the same license. These Trustees are to pay the usual taxes on their physical properties wherever located and assessed unless exempted, also their annual income tax unless exempted by reason of distributions to beneficiaries, as provided under Federal Law. Arrangements have been made for the use of the "Hulbert Plan" and all royalty is fully paid.

Art. 23. Expectancy: For convenience in Accounting, Registration and Apportioning in distributions, the Entire Expectancy Under This Administration (not the Estate properties nor the income therefrom) is hereby divided into One Thousand (1,000) Fractions, each to be termed an Expectancy Fraction and expressed by numbers or words as of No Name Value; such gross number and no name value never to be changed or increased, nor shall the figures thereof be construed to be any index to or expression of the intrinsic values of the Estate or properties whereof it is composed.

In witness whereof, the said Grantors, for themselves, their heirs or assigns, have hereunto set their hands and seals in token of Assignment, Sale, Conveyance and complete Delivery of the properties named, referred to and/or described, and Assent to all of the Articles of Administration as herein set forth.

And the said Trustees, for themselves and possible associate and/or successor Trustees have hereunto set their hands and seals in token of Acceptance of their office or Trusteeship as set forth, Acceptance of the sale and delivery of the property involved, and each does hereby assume the obligations and covenants as set forth, in the Articles of Administration herein.

Done at Los Angeles, California, the day and year first above written.

	JAMES PORTER	(Seal)
	KATIE E. PORTER	(Seal)
CAR E. ILLIAN	PAUL D. PORTER	(Seal)
CAR E. ILLIAN	B. F. SHUMWAY	(Seal)
CAR E. ILLIAN	W. M. DENNISON	(Seal)
.....	JAMES HOWARD PORTER	(Seal)
Witness.	Grantors	
CAR ILLIAN	JAMES HOWARD PORTER	(Seal)
A. GOETZ	PAUL D. PORTER	(Seal)
.....	JOHN C. PORTER	(Seal)
Witness. [50]	Trustees	

And the said Trustees, in their collective capacity, by their duly authorized officers of the Board, have hereunto subscribed confirmation in their Trade Name and have caused their common Seal to be hereto affixed.

PORTER PROPERTY TRUSTEES, LTD.

By JAMES HOWARD PORTER
President

and JOHN DENNISON
Secretary of the Board of Trustees

Hulbert Publishing Company, Chicago, Ill. 1935

State of California,
County of Los Angeles—ss.

I, Benjamin W. Henderson, a Notary Public in and for said County and State of California, do hereby certify that James Porter, Katie E. Porter and James Howard Porter as part of the Grantors, and James Howard Porter as one of the Trustees, designated as such in the within instrument of "Conveyance and Contract", dated this 28th day of February 1935, and consisting of Pages 1 to 10, all included, and which identifies the Board of Trustees to which the above James Howard Porter is numbered, under the Trade Name of Porter Property Trustees, Ltd., are all personally known to me

to be the persons whose names are subscribed to the within instrument, appeared before me and acknowledged that they signed and sealed said instrument for purposes therein set forth; and that James Howard Porter as President and John Dennison as Secretary of said Board of Trustees, identified under said Trade Name as provided for in said "Hulbert Plan" instrument of Conveyance and Contract already described, personally known to me, appeared before me and acknowledged to me that they executed the said instrument as the duly elected and authorized officers of said Board of Trustees, and affixed the Board Seal thereto, all for and in behalf of the said Board of Trustees with authority so to do, and that their act is an act of the Trustees collectively by which they are bound as a Board of Trustees.

Given under my hand and notarial seal this 28th day of February 1935, at Los Angeles, California.

(Seal) BENJAMIN W. HENDERSON
Notary Public in and for the said County and State of California. [51]

My commission expires February 4, 1939.

State of Iowa,
County of Blackhawk—ss.

I, Alice M. Cunningham, a Notary Public in and for said County and State of Iowa, hereby certify that Paul D. Porter and B. F. Shumway, as Grantors and Paul D. Porter, named and designated as

one of the Trustees in the within instrument of Conveyance and Contract, dated the 28th day of February 1935, and consisting of pages 1 to 10, both inclusive, and which identifies the Board of Trustees, which Board includes the said Paul D. Porter, under the Trade Name of Porter Property Trustees, Ltd., are all personally known to me to be the persons whose names are subscribed to the within instrument, appeared before me and acknowledged to me that they signed and sealed said instrument for purposes therein set forth.

Done at Waterloo, Iowa over my hand and Notarial Seal this 5th day of March, 1935.

(Seal) ALICE M. CUNNINGHAM

Notary Public in and for said County and State of Iowa.

My commission expires July 4, 1936.

Dominion of Canada,
Province of Saskatchewan—ss.

Before me, W. A. Goetz, a Notary Public in and for Province of Saskatchewan, Canada, personally appeared John C. Porter, named and designated as one of the Trustees in the within instrument of Conveyance and Contract, personally known to me to be the same person who signed and executed said instrument and acknowledged to me that he signed and executed the same for purposes therein set forth.

In witness whereof, I have hereunto set my hand and affixed my official Seal this 15th day of March 1935.

(Seal) W. A. GOETZ
Notary Public

My commission expires Perpetual. [52]

State of Iowa,
County of Blackhawk—ss.

I, Alice M. Cunningham, a Notary Public in and for said County and State of Iowa, hereby certify that W. M. Dennison named and designated as one of the Trustees in the within instrument of Conveyance and Contract, dated the 28th day of February 1935, and consisting of pages 1 to 10, and which identifies the Board of Trustees and that he is personally known to me to be the person whose name is subscribed to the within instrument, appeared before me and acknowledged to me that he signed and sealed said instrument for purposes therein set forth.

Done at Waterloo, Iowa over my hand and Notarial Seal this 5th day of March 1935.

(Seal) ALICE M. CUNNINGHAM
Notary Public in and for said County and State of Iowa.

My commission expires July 4, 1936. [53]

INSTRUCTIONS TO REGISTER BENEFICIARIES

Porter Property Trustees, Ltd.
Los Angeles, California

Gentlemen:

Conforming to the terms expressed in Article 15 of the instrument of Conveyance and Contract by which you were established as Trustees, I hereby instruct you as follows, to-wit:

Certain debts and obligations have been assumed by this Board of Trustees. These must receive faithful consideration until discharged in their entirety.

You will, therefore, enter into your record of beneficiaries the following data, and the same is to be used as a basis for distribution under said trust estate and never to be changed; except upon death of a beneficiary.

Paul D. Porter	290	one thousandths
John C. Porter	290	
Rebecca P. Wells	65	
Elizabeth P. Dennison	65	
James Howard Porter	290	
	1000	

This order is written after much consideration and consultation regarding the history, relationship

and condition of the properties involved and the parties interested, present and past.

Los Angeles, California, February 28th, 1935.

Respectfully yours,

JAMES HOWARD PORTER

O.K.

JAMES PORTER

KATIE E. PORTER

[Endorsed]: U. S. B. T. A. Filed July 28, 1941. [54]

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 56, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 5 day of Sept. 1941.

(Seal) B. D. GAMBLE,

Clerk,

United States Board of Tax Appeals.

[Title of Board and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 17, inclusive, contain and are a true copy of the supplemental transcript of record, containing excerpts from transcript of the hearing at Los Angeles, California, September 20, 1939, on file and of record in my office as called for by the stipulation of counsel for the parties in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 17th day of December, 1941.

(Seal) B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

[Endorsed]: No. 9920. United States Circuit Court of Appeals for the Ninth Circuit. J. Howard Porter, John C. Porter and Paul D. Porter, identified under the Trade Name Porter Property Trustees, Ltd., Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Filed September 19, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

U. S. Circuit Court of Appeals
Ninth Circuit

No. 9920

J. HOWARD PORTER, JOHN C. PORTER and PAUL D. PORTER, Trustees, identified as a Board of Trustees under the Trade Name PORTER PROPERTY TRUSTEES, LTD.,
Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS UPON WHICH APPELLANTS INTEND TO RELY, SUBMITTED IN ACCORDANCE WITH RULE 19 (6).

Appellants intend to rely upon the following general proposition:

I. That the taxpayer is a pure ancestral trust, taxable as such, and is not an association taxable as a corporation.

(a) That the trust was established for the purpose of equitably distributing property belonging to aging parents to its natural recipients, their children.

(b) That the trust was established for the protection of an incompetent son.

(c) That under terms of the trust instrument, no operations for profit, as distinguished

from the collection of income from the use of the trust properties, were entered into.

(d) That there was no association, as the trustees acted only at the instance and request of the grantors and the beneficiaries knew nothing of the terms or conditions of the trust and had no part in the establishment or operation of the same.

DESIGNATION

In support of these points it is requested that the following parts of the record be printed:

1. Petition filed October 8, 1938.
2. Answer to Petition filed November 23, 1938.
3. Findings of Fact and Opinion of the Board promulgated on September 5, 1940, from the beginning to and including paragraph on page 10, as follows: "We are of the opinion that petitioner was an association and therefore taxable as a corporation", and excluding all thereafter.
4. Order for Redetermination entered March 5, 1941.
5. Petition for Review.
6. Statement of Evidence, including Exhibit attached.
7. Direct Examination of J. Howard Porter, Reporter's Transcript pages 28 to 35 to and including Answer (p. 35) "That is right, and other individuals also besides real estate men."

8. Direct Examination of James Porter, Reporter's Transcript beginning at page 15, "By Mr. Henderson" and ending with page 22.

Respectfully submitted in accordance with Rule 19(6).

BENJAMIN W. HENDERSON
Attorney for Appellants

State of California,
County of Los Angeles—ss.

Eleanor R. Norbunt, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above entitled matter; that affiant's business address is 1144 Subway Terminal Building, Los Angeles, California. That on the 6th day of November, 1941, affiant served the within Statement on the Respondent in said matter, by placing a true copy thereof in an envelope addressed to the attorney of record for said Respondent, at the office address of said attorney as follows:

J. P. Wenchel, Chief Counsel,
Bureau of Internal Revenue,
Treasury Department,
Washington, D. C.

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for

the persons by and for whom said service was made. That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

ELEANOR R. NORBUNT

Subscribed and sworn to before me this 6th day of November, 1941.

(Seal) BENJAMIN W. HENDERSON
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 7, 1941. Paul P. O'Brien, Clerk.

No. 9920.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. HOWARD PORTER, JOHN C. PORTER and PAUL D. PORTER, identified under the trade name PORTER PROPERTY TRUSTEES, LTD.,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

BENJAMIN W. HENDERSON,
1144 Subway Terminal Building, Los Angeles,
Attorney for Petitioners.

Independent-Review, Law Printers, Los Angeles, Calif.

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No. 9920.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. Howard Porter, John C. Porter and Paul D. Porter, identified under the trade name Porter Property Trustees, Ltd.,

Petitioners,

vs.

Commissioner of Internal Revenue,

Respondent.

BRIEF FOR PETITIONERS.

Preliminary Statement.

This appeal is from a decision of the United States Board of Tax Appeals in favor of respondent and against petitioners. The cause involves a deficiency assessed by the Commissioner of Internal Revenue for income and excess-profits tax for the year 1935. The Commissioner held the petitioners to be an association within the meaning of Section 801(a)(2) of the Revenue Act of 1934, and taxable as a corporation. The Board of Tax Appeals affirmed the decision of the Commissioner in this respect by its decision entered March 5, 1941.

The Question Presented.

Are the petitioners a pure trust, taxable as such, or, are they an association, taxable as a corporation, within the meaning of Section 801(a)(2) of the Revenue Act of 1934?

Statutes and Regulations Involved.

Sections refer to Revenue Act of 1934—*Articles* refer to Regulations 86.

> Sec. 161.(a) The taxes imposed by this title upon individuals shall apply to the income of * * * any kind of property held in trust, including—
>
> (4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.
>
> (b) The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).
>
> Art. 161-1. Supplement E prescribes that the taxes imposed upon individuals by Title I shall be applicable to the income of * * * any kind of property held in trust (except in the case of those trusts within the scope of sections 165, 166, and 167). * * *
>
> Sec. 801.(a) When used in this Act—
>
> (2) The term "corporation" includes associations, joint-stock companies, and insurance companies.
>
> * * *
>
> Art. 801-2. The term "association" is not used in the Act in any narrow or technical sense. It includes any organization, created for the transaction of desig-

nated affairs, or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. In includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an inter-insurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Act, a trust or an estate, or a partnership. If the conduct of the affairs of a corporation continues after the expiration of its charter, or the termination of its existence, it becomes an association.

Art. 801-3. The term "trust", as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement where-

by the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action,

of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other "officer," the use of a "seal", the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form itself. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

Statement of the Case.

A stipulated statement of the evidence is fully set forth at pages 46 to 70, inclusive, of the Transcript of Record. The trust instrument appears at pages 70 to 92, inclusive. No useful purpose would be served by further repetition at this point. However a brief resume of the pertinent facts is as follows:

James Porter, over 70 years of age, and Katie E. Porter, his wife, were the owners of certain property consisting principally of agricultural and unimproved lands in the states of California, Minnesota and Iowa. In 1930 they organized a corporation and transferred the said property thereto in exchange for its capital stock. Some of the lands were thereafter sold on contracts and some improved both prior to and during the time it was held by the corporation. Some farming operations were carried on by lease tenants on a straight rental basis. Some transfer of the shares of capital stock of the corporation were made subsequent to the initial issue and on February 28, 1935 the capital stock of the corporation was held as follows:

Name	Relationship	Shares held
James Porter	Father	685
Katie E. Porter	Mother	1,858
Paul D. Porter	Son	50
B. F. Shumway	Nominee of father	65
W. N. Dennison	Husband of daughter	50
Rebecca P. Wells	Daughter	50
James Howard Porter	Son	50
John C. Porter	Son	0
Elizabeth P. Dennison	Daughter	0
Total shares		2,808

On February 28, 1935, for the purpose of equitably distributing their property to their children, and at the same time give protection to a son who was addicted to the liquor habit [Tr. pp. 51-52], James Porter and Katie E. Porter executed a trust instrument by which they transferred in trust all of the property making up the corpus of this trust. After the trust instrument had been signed by Porter and wife, it was then signed by the trustees in accepting their office and obligation as such. [Tr. p. 52.]

The beneficial interests in the trust were entered in the trust records on the order of James Porter and Katie E. Porter as follows:

Paul D. Porter	290	one	thousandths
John C. Porter	290	"	"
Rebecca P. Wells	65	"	"
Elizabeth P. Dennison	65	"	"
James Howard Porter	290	"	"
	1000		

[Tr. pp. 91-92.]

No certificates of beneficial interest, or writings of any kind pertaining thereto, have at any time been issued. [Tr. p. 66.] The record of beneficiaries is never to be changed except in the event of the death of a beneficiary. [Tr. p. 91.]

The trust was entered into by a series of documents and acts all done on February 28, 1935 and completing one transaction.

James Porter and Katie E. Porter signed the trust instrument without the knowledge of the trustees or beneficiaries [Tr. pp. 51-52; 56-58; 61], and then requested the trustees to act as such. They delivered to trustee James Howard Porter 2408 shares of stock in the James Porter Investment Company, which shares were simultaneously surrendered to the James Porter Investment Company in exchange for all of the assets of said company except one parcel situate in Grundy County, Iowa. Said assets consisted of real estate and land contracts. Shortly thereafter the James Porter Investment Company was liquidated and dissolved. [Tr. p. 48.]

Income for the year in question was from farm rentals, from land-owners oil royalties under oil and gas leases on the lands at the inception of the trust, and from interest on contracts receivable, likewise acquired. The same was duly reported. [Tr. p. 50.]

The purpose of the trust as testified to by James Porter, the grantor, was to distribute their property equitably to their children and at the same time give protection to a son who was subject to the liquor habit. [Tr. pp. 51-52, 56.]

Since the appointment of the trustees they have cared for the property entrusted to them. James Howard Por-

ter has been the most active of the three in this respect. He has maintained financial records of receipts and disbursements and has made leases to tenants for the farming of parts of the lands. He has collected rents and has reported to the other trustees when he has happened to see them as to what he has done. The other trustees have looked after some of the land that was located close to them. The beneficiaries have not been consulted nor advised with in connection with the operation of the property. Some distribution to the beneficiaries has been made. Some of the land has been farmed by tenants under terms of leases which have been given them by James Howard Porter, trustee. [Tr. p. 61.] The trustees did not actually farm any of the property themselves. [Tr. p. 62.]

The trustees have attempted to get offers of sale for some of the property both through real estate agents and individuals but have not been able to sell any of the said land. [Tr. p. 62.]

ARGUMENT.

I. The Board of Tax Appeals erred in finding that the petitioners were an association and taxable as a corporation, since the evidence does not support such a finding.

II. Petitioners are trustees of a pure ancestral trust, taxable as such, and are not an association taxable as a corporation.

(a) The trust was established for the purpose of equitably distributing property belonging to aging parents to its natural recipients, their children.

(b) The trust was established for the protection of an incompetent son.

(c) In the management of the trust property, no operation for profit, as distinguished from the collection of income from the use of the properties, were entered into.

(d) There was no association, as the trustees acted only at the instance and request of the grantors, and the trustees and beneficiaries knew nothing of the terms or conditions of the trust at its inception and had nothing to do with its establishment. The beneficiaries have had nothing to do with the operation of the same.

I.

When Congress enacted the Revenue Act of 1934 it clearly specified that a trust was taxable upon an entirely different basis to an "association". Section 161 of said Act provided:

> "The taxes imposed by this title upon individuals shall apply to the income of * * * any kind of property held in trust * * * except * * * as relating to revocable trusts * * * and (as) relating to income for benefit of the grantor."

The distinction has been further recognized by the Treasury Department in its Regulation 86, Article 801-3, promulgated under authority of the same revenue act, as follows:

> "The term 'trust', as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.
>
> "As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the

benefit of beneficiaries. Such an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages.

"If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation. By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as '*quasi*-corporate form.' The effectiveness in action in the case of a trust or of a corporation does not depend upon

technical arrangements or devices such as the appointment or election of a president, secretary, treasurer, or other 'officer', the use of a 'seal', the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a 'charter' or 'by-laws', the existence of 'control' by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained in the case of a trust, by the use of the trust form itself. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

"The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed."

The courts have uniformly recognized the distinction made by Congress for the taxation of trusts and have divided the field into two distinct classes.

First there is the Business Trust or "Association" which is adeptly described and defined in

Morrissey v. Commissioner, 296 U. S. 344

wherein the Supreme Court states that the term "association" implies associates who join in a business enterprise for the purpose of transacting business and sharing in its gains. This opinion further defines the distinctive features of an association as being an organization created to enable the participants to carry on a business and divide the gains which accrue from the common undertaking. This class of trusts, of course, is taxable as a corporation.

In the second class we have the Liquidating trust and Ancestral trust which is created for the purpose of conserving, dividing and distributing the family estate and in the meantime carrying on such business as is incidental to the specific property administered. Examples of such trusts have been distinguished in,

Commissioner v. Guitar Trust Estate, 72 Fed. (2d) 544;

Blair v. Wilson Syndicate Trust, 39 Fed. (2d) 43;

Living Funded Trust of Harry E. Lyman v. Comm., 36 B. T. A. 161;

U. S. v. Davidson, 115 Fed. (2d) 799,

where the courts have consistently held that the trusts therein considered were ancestral trusts taxable as pure trusts.

We contend that such is the case with the instant trust and that the findings of the Board of Tax Appeals to the contrary are not supported by the evidence. The gist of the findings appear on page 37 of the transcript wherein the Board states, "A glance at the history of the present trust leaves no doubt that there was here such a purpose." (business purpose.) It goes on to point out that James Porter and wife owned agricultural lands; they created a corporation and took shares in exchange for the lands. All of the shares were held by the Porters, two sons, one daughter, a son-in-law and a nominee (the Porter family). "In 1935 a trust was substituted for the corporation, * * *." "The new trust beneficiaries are still the members of Porter's family, although their relative interests have changed somewhat since the corporation wa dissolved."

The findings entirely disregard all evidence that the trust was entered into for the purpose of equitably distributing the estate of aging parents to their children and at the same time protecting a son addicted to the liquor habit. While the Board skips over the evidence and arrives with an unsupported conclusion, the facts in evidence are that in the corporation the Porters owned practically all of the property represented by the stock, only three of their children holding approximately 5%. The creation of the trust and all matters in connection therewith were dictated and carried out by and under the orders of the Porters with the final result that they owned none of the beneficial interest, the same being divided 100% among their five children. Of course the land did not drop its identity. It was the same soil. Also it was

still owned by "members of Porter's family" but each member is a distinct individual and holds in his own right.

Again the Board looks back to the corporation [Tr. p. 40] when it says:

> "* * *, we need look only beyond the creation of the trust to the prior corporation to find parents and children happily associated together under the form of a corporation in carrying on their farming operations. In the transmutations which followed it would seem of little moment that certain members of the family passed from the active role of shareholders to the passive one of beneficiaries."

We know of no rule of law whereby property once titled in a corporation acquires a disability which prevents it from again going into private ownership.

II.

Petitioners are trustees of a pure ancestral trust, taxable as such, and are not an association taxable as a corporation.

Generally, three tests have been found in the Treasury Department regulations to aid in arriving at the conclusion as to whether or not a trust is an "association" within the meaning of the revenue act. These are (a) Purpose; (b) Actual operation; (c) Form of organization.

> *Commissioner v. Vandergrift Realty & Inv. Co.*, 82 Fed. (2d) 387.

The Court in this case at page 390, says:

> "There can hardly be a serious question as to the fact that the trust (Vandergrift) was carried on under a corporate form, but the Supreme Court indi-

> cates very clearly in Morrissey v. Commissioner (56 S. Ct. 289) that little consideration should be given to the form or organization under which the trust is operated, but rather that the true rule is that purpose and actual operation of the trust should be controlling in determining whether or not the trust shall be classified as an association for tax purposes."

In the instant trust the property constituting the corpus was once titled in a corporation but by a series of instruments and acts all done at the same time and constituting one transaction [Tr. p. 48] the actual property was titled in the trustees and the corporation dissolved. The ownership of the property both legal and equitable changed completely and the resulting transaction was a gift in trust from James Porter and wife to their five children. The law recognized a completed transaction by one or more acts or instruments as one transaction and looks through the actual form of said separate acts to get the purpose and net result of the accomplishment.

Lewis v. Commissioner, 301 U. S. 385.

The purpose of the trust is definitely stated by the grantor James Porter. He consulted with his attorney and with Mrs. Porter and decided to establish the trust; they had the papers prepared, and signed the same after which they requested the trustees to act and at the same time secured the deed to specific property to make up the corpus of the trust. Porter and wife at the same time signed an order to register their five children as beneficiaries under the terms of the trust to thereby equitably distri-

bute their property that was going into the trust among their five children [Tr. p. 52], and also give protection to a son who was addicted to the liquor habit [Tr. p. 56]. The fact that it may or may not have accomplished any change in taxing basis is immaterial. There is neither law nor prejudice against any person taking advantage of any legitimate means to change his status for tax purposes.

It is submitted that the purpose of the trust was worthy as well as legal and that the same falls directly within the classification of ancestral trusts as outlined in *Comm. v. Guitar; Blair v. Wilson Syndicate; Lyman v. Commissioner;* and *U. S. v. Davidson, supra.* Now let us look to the operation.

All evidence as to the operation of the trust is found in the testimony of James Howard Porter, one of the trustees. He has been in charge of the trust property since the inception of the trust. He has kept records of income and disbursements with the aid of a bookkeeper. The trustees never held any formal meetings but saw each other occasionally. No meetings were held with beneficiaries nor were they advised with in connection with the conduct of the affairs of the trust. The property belonging to the trust is practically all farm land and some of the land has been farmed by lease tenant farmers under terms of leases which the trustees made with them. None of the lands were farmed by the trustees. The trustees collected rents due to the trust and have made some disbursements to the beneficiaries. They also made some effort to sell part of the property but no sales were made. [Tr. pp. 60-70.]

It will plainly appear that the activity of the trust has been strictly limited to the normal care incidental to the property belonging thereto. No business was carried on. No farming activities were engaged in. Part of the land was simply rented to tenants on a lease basis, the rents collected and the money disbursed, some of it being distributed to beneficiaries. The business activity was nominal and certainly by any stretch of the imagination cannot be extended to indicate that the trust was engaged in a business undertaking.

In *United States v. Davidson, supra,* the trust property consisted of corporate stocks; bonds and notes; bank deposits; the capital stock of two sugar companies; and loans to these companies and to the Davidson Steamship Company. James E. Davidson, trustee of the trust, became general manager of these companies. During the life of the trust large sums of money were loaned to these various companies to protect money already loaned to them. The trustee loaned large amounts to the steamship company for the purpose of protecting and preserving vessels until they could be sold. When they were sold the loans were repaid. The trustee kept on hand large amounts of money with which to meet contingencies and from time to time invested in securities. The trial court found that these investments were not made "with a view to market profits; that his investments were not of a nature or volume to classify him as a banker, broker, trader or money lender; that he had done no more than hold and attempt to preserve the trust property and receive the ordinary fruits of its ownership and that this was incidental to the ultimate liquidation and distribution of the property."

The case at bar presents a similar situation but with even lesser business activity. The property involved was put to its normal use by lease tenants. The trustee's duties were in all respects ministerial. He entered into simple leases covering the property, collected the rents and disbursed the proceeds.

Conclusion.

We conclude that the purpose of the instant trust was to distribute to its natural recipients the property belonging to an aging father and mother, that the operation of the trust has only involved such activity as was incidental to the property and that the trustees have done no more than to receive the ordinary fruits of its ownership. The trust is not and has not been engaged in business and is not an association as contemplated by the Revenue Act of 1934. It is therefore not taxable as a corporation.

Respectfully submitted,

BENJAMIN W. HENDERSON,
Attorney for Petitioners.

No. 9920

In the United States Circuit Court of Appeals for the Ninth Circuit

J. HOWARD PORTER, JOHN C. PORTER AND PAUL D. PORTER, IDENTIFIED UNDER THE TRADE NAME PORTER PROPERTY TRUSTEES, LTD., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
GERALD L. WALLACE,
S. DEE HANSON,
Special Assistants to the Attorney General.

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CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 9920

J. Howard Porter, John C. Porter and Paul D. Porter, Identified Under the Trade Name Porter Property Trustees, Ltd., petitioners

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Board of Tax Appeals (R. 22–40) is reported in 42 B. T. A. 681.

JURISDICTION

This petition for review (R. 42–45) involves federal income and excess-profits taxes for the taxable year 1935. On July 11, 1938, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency in the total amount of $3,597.57. (R. 10–20). Within ninety days thereafter and on October 8, 1938, the taxpayer filed a petition with the Board of Tax Ap-

peals for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code. (R. 4–20). The final order and decision of the Board of Tax Appeals sustaining the deficiency, was entered on March 5, 1941. (R. 41.) The case is brought to this Court by a petition for review filed June 2, 1941 (R. 42–45), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the trust of which the petitioners are trustees was an association, and therefore taxable as a corporation during the taxable year 1935, within the meaning of Section 801 (a) (2) of the Revenue Act of 1934, as determined by the Commissioner and held by the Board, or a pure trust and taxable as such, as claimed by the petitioners.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra,* pp. 36–39.

STATEMENT

The facts, as stipulated in part (R. 46–50), and as developed partially from the evidence adduced at the hearing of the case (R. 50–92), were found by the Board of Tax Appeals, as follows (R. 23–34):

J. Howard Porter, John C. Porter, and Paul D. Porter, are the trustees of the petitioner, Porter Property Trustees, Ltd., an express trust, created by a written instrument dated February 28, 1935. Before February 28, 1935, the entire outstanding capital stock

of the James Porter Investment Company, a Delaware corporation, consisting of 2,808 shares, was owned and held by James Porter and Katie E. Porter, husband and wife, and members of their family. (R. 23.) The following shows the interest and relationship of each stockholder (R. 24):

Name	Relationship	Shares held
James Porter	Father	685
Katie E. Porter	Mother	1,853
Paul D. Porter	Son	50
B. F. Shumway	Nominee for father	65
W. N. Dennison	Husband of daughter (Elizabeth)	50
Rebecca P. Wells	Daughter	50
James Howard Porter	Son	50
John C. Porter	Son	0
Elizabeth P. Dennison	Daughter	0
Total		2,808

On February 28, 1935, and for some time before then, the James Porter Investment Company was the owner of certain personal property, and also held in fee simple certain land, mainly agricultural and unimproved, and situate in Kern County and San Luis Obispo County, California, Nobles County, Minnesota, and Grundy County, Iowa. This land was acquired by the James Porter Investment Company at the time of its incorporation in 1930, from James Porter and Katie E. Porter in exchange for its capital stock. Such of its personal property as was not acquired by that company in a like manner, and at the same time, was acquired by the company in the course of its ordinary business activities afterwards but before February 28, 1935. Certain of these lands had been improved before and during the period held by the com-

pany, and farming operations were carried on by leaseholders for profit on part of these lands while they were owned and held by the company. (R. 24.)

On February 28, 1935, James Porter, Katie E. Porter, Paul D. Porter, F. B. Shumway, W. M. Dennison, and James Howard Porter, as grantors, and James Howard Porter, Paul D. Porter, and John C. Porter, as trustees (hereinafter sometimes referred to as the trustees) executed and entered into a written "Conveyance and Contract" agreement, incorporated herein by reference, the relevant parts of which are later set out, by which the trust involved herein, known as the Porter Property Trustees, Ltd., was created. By the terms of the trust instrument, the trustees were selected and appointed by the grantors, and were therein designated and described as the board of trustees and were authorized to act under and use the trade name of Porter Property Trustees, Ltd. There were transferred and conveyed to the trustees at the time of creation of the trust 1,723 shares of the capital stock of the James Porter Investment Company which constituted all the shares shown in the table above, except the 685 shares in the name of James Porter and 400 of the 1,858 shares in the name of Katie E. Porter. On the day of their constitution as such, February 28, 1935, the trustees, acting in their collective capacity, acquired from James Porter the 685 shares noted above in consideration for their assumption of his debt in the amount of $52,000. (R. 25.)

The interests of the respective trust beneficiaries are described in the trust instrument as "expectancy frac-

tions." (R. 25.) Article 15 of the trust instrument provides as follows (R. 26):

> ART. 15. REGISTRATION & DORMANT FRACTIONS: Expectancy Fractions under this administration shall at first be allotted in the records of the Board under instructions delivered to the Board by James Howard Porter. Should fractions appear dormant thereby, while held dormant they shall not be reckoned with when apportioning in distributions, such being computed solely by or upon the fractions registered as to beneficiaries at time of making each distribution. Dormant fractions, their usefulness being contingent upon possible future conveniences, remain subject to the discretion of the Trustees.

Pursuant to the provisions of "Art. 15" of the trust instrument, under instructions from James Howard Porter, expectancy fractions were allotted in the records of the board of trustees as follows (R. 26):

Name:	*Expectancy fractions*
Paul D. Porter	290/1000
John C. Porter	290/1000
Rebecca P. Wells	65/1000
Elizabeth P. Dennison	65/1000
James Howard Porter	290/1000
Total	1000/1000

Immediately after the trustees had acquired the 2,408 shares of the James Porter Investment Company on February 28, 1935, as set forth above, they exchanged them with that company for all its assets (except one parcel of real estate situate in Grundy County, Iowa, known as the Porter Homestead), subject to its then outstanding liabilities. Shortly there-

after the company was liquidated and dissolved. (R. 26–27.)

Included among the assets of the company thus acquired were certain land sale contracts which provided for future payments by the purchasers, some of them not becoming due and payable until after their acquisition by the trustees. At this time the company was treating with the Standard Oil Company for the lease by the latter of a part of these lands situate in Kern County, California. The negotiators had by then reached an agreement for the execution of a lease which was to be executed by the James Porter Investment Company for the use and benefit of the Porter Property Trustees, Ltd., and then to be assigned to the trustees. This was accordingly done. Under its terms the lessee was obligated to explore, develop, and drill certain wells on the leased land for oil or gas of commercial quality and in commercial quantity. This was done but no oil or gas was found, and the lessee quitclaimed its interest to the trust in the year 1938. Under the terms of this lease agreement certain oil and gas royalty interests were retained by the lessor, in addition to the bonus paid by the lessee for the execution of the lease. (R. 27.)

The trust instrument provided for the following additional matters: (1) The trustees were given the power to sell and to convey and deliver any, all, or such of the trust properties as they might see fit, in their discretion; (2) the trustees were authorized to add to their number and to choose their successors, provided that the number of trustees should at no time

exceed five; (3) the trustees and/or their successors were to hold the trust properties throughout the existence of the trust; (4) the trust was to continue indefinitely for any lawful term; (5) the trustees were authorized to act together, informally over their individual signatures, or collectively, under the name of Porter Property Trustees, Ltd., through duly authorized officers of their board; (6) the trustees, acting as the board of trustees, were authorized to delegate to, by proper resolution, any member or members of the board the necessary authority to transact any and all business of the trust, including the execution of deeds, conveyances, and other instruments in writing; (7) the trustees, in whom "legal and equitable title to all estate properties are vested", were made the absolute owners of the trust properties, with full powers of management thereof; (8) provision was made for regular and special meetings of the board of trustees; (9) the trustees were authorized to engage in any lawful business; to own real estate and personal property in any of the several states, without limit; to buy, sell, improve, exchange, assign, convey and deliver, and to grant trust deeds, and to mortgage or otherwise encumber for obligations; to own stock in or entire charters of corporations; and to engage the trust funds and properties in any industry or investment in their discretion, hoping thereby to make gain for the trust; (10) the trustees were authorized to and did adopt a common seal; (1) the trustees were authorized to regard the trust instrument as their guide, and to supplement the same from time to time

by proper resolutions written into the office records of the board of trustees, or to adopt formal bylaws or rules of business conduct; (12) the trustees were authorized to elect a presiding officer, or president, and to select and appoint a board sceretary, and to delegate duties and authority to them; (13) the trustees were authorized to fix and pay all compensation of officers, agents, and employees, and to pay to themselves such reasonable compensation as might be determined by a regular act of their board; (14) the trustees were required to keep a faithful financial record of all business transactions, and the name and address of each known beneficiary; (15) all income and trust funds, when collected or paid over to the trustees, were to constitute a fund from which the trustees should pay trust obligations, reinvest or distribute to the beneficiaries, in their discretion; (16) the personal liability of the trustees was limited to the value of the trust funds and properties; (17) the filing of a copy of the trust instrument in the public records of some designated county was to be constructive notice to the world of such specific personal liability limitations of the trustees, and that all persons, corporations, or companies extending credit to, contracting with, or having claims against the trustees must look only to the funds and properties of the trust for payment or discharge of such obligations; (18) the trustees might provide for annual or other meetings of the trust beneficiaries to hear and discuss reports and forecasts; (19) while they might adopt resolutions of protest or

commendation, no act of the beneficiaries, as such, should be mandatory or interfere with the right of the trustees exclusively to manage the business affairs and control the trust funds and properties; (20) the death of a beneficiary should not entitle his legal heirs or representatives to demand any partition of or interest in or distribution from the trust funds or properties, but his legal heirs might succeed to his interest; (21) changes in beneficiaries from any cause should be duly noted by the trustees on their resords; (22) the trustees might at any time, in their discretion, and from any available trust funds, make partial distributions to beneficiaries, and ultimately, upon termination of the trust, should distribute the entire residual trust funds to the beneficiaries in accordance with their proportionate interests; (23) the trust was irrevocable; (24) the beneficiaries might be called by the trustees to meet annually or at other times and they might adopt resolutions but no act of the beneficiaries should be mandatory on the trustees. (R. 27–30.)

James Howard Porter has been, since the trust's inception in 1935, the president of its board of trustees and, with the two other trustees, has managed its business during the same period. He has been more active than the other trustees in its management. He confers informally with the other trustees. Farm lands owned by the trust are leased to farmers for profit. James Howard Porter executes all leases on behalf of the trust and he attempts to negotiate only such leases as will prove profitable to the trust. The affairs of the

trust were carried on during the year 1935 in accordance with the terms of the trust instrument. Of the amount of $63,596.29 determined by respondent to have been derived by the trust from "oil royalties" during the year 1935, $46,000 represents a bonus received by the trust from the Standard Oil Co. of California as consideration for the execution of the lease already mentioned. (R. 30–31.)

The James Porter Investment Company sold certain land on installment contracts before February 28, 1935, and on that day transferred the contracts to the petitioner. The fair market value of these contracts at the time of this transfer was equal to the face amount of the balances due thereon. In 1935 petitioner received payments in the aggregate amount of $5,749.50 on account of the contracts. (R. 31.)

The James Porter Investment Company was the owner of an undisclosed number of shares of the Morrison Savings Bank of Morrison, Iowa, before February 28, 1935, and on that day transferred these shares to the petitioner. In 1932 or 1933 a receiver of the bank was appointed and at an undisclosed date the receiver levied an assessment on all the bank's shareholders. Petitioner paid $2,202.50 in 1935 in full satisfaction of its share of the assessment, pursuant to a notice of assessment received by it in the taxable year, which notice was the first notice given of such assessment. (R. 31–32.)

In arriving at the adjusted net income of $13,061.10 for the year 1935, as shown by the notice of deficiency, the Commissioner determined that petitioner had a

gross income of $74,794.64, for that year, derived as follows. (R. 32):

Farm income	$1,580.12
Payments Land contracts	8,652.89
Oil royalties	63,596.29
Miscellaneous income	106.19
Interest	859.15
Gross income	74,794.64

In the deficiency notice the Commissioner determined that in 1935 petitioner was an association taxable as a corporation within the meaning of Section 801 (a) (2) of the Revenue Act of 1934 and Articles 801 (2) and (3) of Treasury Regulations 86.

Within the time provided by law the petitioner trust filed an individual income tax return for the year 1935, under Title I of the Revenue Act of 1934, disclosing thereon a net income of $7,192.38 and a tax liability of $337.31. No other return was filed by petitioner for the year 1935.

Upon the basis of the foregoing facts the Board, affirming the Commissioner's determination (R. 10–20), held that the trust owned and operated real estate during the taxable year, and therefore it was an association taxable as a corporation within the meaning of the pertinent statute (R. 37–40). The Board thereupon entered its decision (R. 41) from which the taxpayers petitioned this Court for review (R. 42).

SUMMARY OF ARGUMENT

The trust herein was an association during the taxable year 1935, within the meaning of the statute, regulations and authorities, and is therefore taxable at corporate rates. The evidence shows that it was

in fact formed primarily for the purpose of continuing the grantors' properties as going businesses in an organized capacity for profit. It fails to support the taxpayer's contention that the grantors intended, upon creating the trust, that the primary and ultimate purpose of the trust was merely to care for the property and distribute it equitably to the children. According to the terms of the trust instrument, it had unity of management, centralized control, limitation of liability and "expectancy fractions", representing the beneficiaries' shares of interest in the trust property. These are the essential elements of a corporation. The trustees managed and carried on the business activities of the trust for gain, and the profits realized therefrom were distributable or distributed among the beneficiaries on the basis of the proportionate shares of interest each had in the business or property owned, controlled and operated by the trust. The trustees were not restricted to mere incidental and administrative activities such as the collection of funds and payment thereof to the beneficiaries, as in the case of a pure trust. Rather, they had sweeping powers similar to and much greater than those of corporate officers and directors. It follows, therefore, that the trust, created for the same purposes and activities for which a corporation might have been formed for profit, was essentially a statutory association doing business and taxable as a corporation, as determined by the Commissioner and held by the Board.

While the trustees had very broad and complete powers to carry on the business of the trust, it is im-

material whether or not they actually exercised *all* the powers given them by the trust instrument. It is settled that the nature or purpose of the undertaking may not be considered narrower than that formally set forth in the agreement. It was sufficient that they used only whatever powers were actually necessary to manage and carry on the business for the benefit of the trust and those in interest.

The fact that the grantors and not the beneficiaries created the trust is immaterial since it is not necessary that the beneficiaries must have joined in the enterprise at its inception. It is settled that associates may join in such a plan at the outset, or by later participation according to the terms of the agreement share the advantages of a union of their interests in the common enterprise. In either event, the enterprise constitutes an association taxable at corporate rates for income tax purposes.

ARGUMENT

The trust in question was an association taxable at corporate rates during the taxable year 1935 within the meaning of the pertinent statute, regulations and authorities

The Board held that there was a business purpose back of the creation and continuance of the present trust and a single increasing purpose to retain the advantages of centralized control, limitation of liability and the other advantages associated with the corporate form in actively carrying on the trust's business of farming lands and distributing the income therefrom (R. 37, 38); that the bases relied on by the taxpayer as distinguishing the trust from an association are

incidental and go merely to the outward form of the trust whereas it is not the particular form of doing business so much as the business purpose and the profit motive which are determinative (R. 38–39); that the facts indicate that the predecessor corporation, through which the family's farming operations were previously carried on, was merely in effect transmuted into the trust which it was thought could be operated without paying corporate rates, but that it was immaterial that certain members of the family passed from the role of active shareholders to passive beneficiaries; and that therefore the trust was an association taxable as a corporation during the year 1935 within the meaning of the statute (R. 40).

We submit the Board was correct in so holding, and that the trust, in its purposes as set forth in the trust instrument and its activities during the taxable year as shown by the evidence, was plainly an association taxable as a corporation under the pertinent statute, regulations and authorities, as shown hereinafter.

The statute provides that the term "person" includes an individual, trust or corporation, and that taxable corporations include "associations". Section 801 (a) (1) and (2) of the Revenue Act of 1934, Appendix, *infra*. The pertinent regulations provide that the term "association" includes any organization, however created, for the transaction of designated affairs or the attainment of some object which, like a corporation, continues and the affairs of which are conducted by a single individual, board or group acting in a representative capacity. Regulations 86, Article 801–2, Appendix, *infra*. They also provide that a trust is

an association taxable as a corporation where the trustees, under the trust agreement, hold and manage property with a view to profit for the beneficiaries. Such an arrangement, the regulations state, is designed to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for a corporate organization, thus obtaining the fundamental benefits enjoyed by a corporation. It is not the size or the amount of capital invested in the trust but rather the purposes for which a corporation, under similar circumstances, might have been formed for profit, which are the important and significant distinguishing features between a business and a strict trust. Id., Article 801–3, Appendix, *infra.* We submit that these regulations are reasonable, and not inconsistent with the provisions of the statute as interpreted by judicial authority. Therefore, having the force and effect of law, they should be given effect. *Old Mission Co.* v. *Helvering,* 293 U. S. 289; *Hassett* v. *Welch,* 303 U. S. 303.

The taxpayer contends that the Board's finding that the trust was an association taxable as a corporation, disregards all the evidence that the trust was allegedly established for the purpose of equitably distributing the estate of aging parents among their children and protecting an incompetent son. (Br. 11–16.) It is said that the trust is merely a pure ancestral trust, since no business was carried on other than renting part of the land to tenants. The taxpayer claims that these were merely nominal business activities for the normal care of the trust properties, and the collection

and partial distribution of the income therefrom to the beneficiaries (Br. 16–20).

The evidence, however, is to the contrary. The trust instrument (R. 70–90) shows that the primary purposes of the trust were to improve and operate the trust property for profit for the benefit of the grantors' several children as beneficiaries, and to distribute the income to them according to their respective "expectancy fractions" or shares of interest. The trustees were given extensive and complete powers to carry on the operations of the trust accordingly. (R. 27–32, 48, 50–92.) Thus the purposes for which the trust was formed, as set forth in the trust instrument, and its actual business activities and operations carried on by the trustees as shown by the evidence, plainly show that the trust was in fact an operating business trust carried on for profit.

The terms of the trust instrument (R. 70–90) plainly show that the trust was a statutory association having continuity, centralized control, limitation of liability, and all the essential characteristics of a corporation. The trustees, in whom "legal and equitable title to all estate properties are vested" (R. 81–82), had plenary powers of management of the trust properties, and could in their discretion sell any and all of the trust properties at any time as they saw fit (R. 27–28, 74, 76). They had powers of the most sweeping sort to carry on the business of the trust. In fact, their powers were greater than those possessed by the officers and directory of a corporation. For example, they could act together informally over their individual signatures without reference to the

board of trustees (R. 28, 75) and, in their discretion, engage the trust funds and properties in any industry or investment in any state in the Union with a view to profit (R. 28, 29, 76).

Moreover, the trustees' powers were exclusive and predominant over any rights of the beneficiaries who had shares of beneficial interests. (R. 25–26, 47, 91–92). The rights of those beneficiaries who were not trustees were limited to the privilege of receiving distributions at the pleasure of the trustees and protesting by resolution, if assembled in meeting by the trustees. In no event could their acts be mandatory or interfere with the rights and powers of the trustees exclusively to manage and control the affairs and properties of the trust. (R. 30, clauses 19, 22, 24; R. 80, Art. 13; R. 82, Art. 17.)

The facts clearly show that the trust was operating and doing business as a statutory association. Thus the Board found (R. 27, 30–32), and the evidence shows (R. 59–70), that during the taxable year one of the trustees acted as president of the board of trustees and, together with the other two trustees, managed and looked after the business interests of the trust; leased the trust's farm lands to tenant farmers for profit; executed all the leases on behalf of the trust; negotiated only such leases as would prove profitable to the trust; and carried on generally the business affairs of the trust during the taxable year in accordance with the terms of the trust instrument.

The trust carried on other business activities as well. A lease negotiated by the predecessor corporation with the Standard Oil Company of California was taken

over by the trust upon its creation. Under the terms of the lease, Standard Oil as lessee was obligated to explore, develop and drill certain wells for oil or gas of commercial quality and in commercial quantity. The trust retained oil and gas royalty interests therein, and received in the taxable year 1935 the sum of $46,000 as a bonus from the lessee as consideration for the execution of the lease, in addition to approximately $17,600 derived from other oil royalties during that year. (R. 27, 31.) The trust also received in 1935 the sum of approximately $5,750 from land installment contracts negotiated by the predecessor corporation and transferred to the trust upon its creation in that year (R. 31); and paid approximately $2,200 in 1935 pursuant to an assessment levied by the receiver on shares of stock of the Morrison Savings Bank of Morrison, Iowa, which were transferred to the trust, upon its creation, from the predecessor corporation (R. 31–32).

The evidence amply supports the Board's findings as to the business purposes, activities and operations of the trust for profit. Thus, the testimony shows that the three trustees managed the business interests of the trust and its properties in accordance with the terms of the trust instrument to the best of their ability. (R. 59–60, 65, 69, 70.) They leased the trust's farm properties on a profitable basis to tenants who operated them on a lease basis, took such action as was necessary to enter into such leases for the benefit of the trust, collected whatever rents were due from such lease tenants, and saw to it that all collections of the

trust were made and its obligations paid. (R. 48, 61, 62, 68, 69, Br. 18–19.) The trustees kept books of account and financial records reflecting the financial transactions and condition of the trust and all income and disbursements, maintaining a bookkeeper for such purpose. (R. 65, 67, 69–70, Br. 18.) Finally, they made distributions to the beneficiaries from time to time under the terms of the trust. (R. 61, 67, Br. 18–19.) Moreover, it was stipulated that certain of the trust's lands had been improved and farming operations were carried on thereon by the lease tenants (R. 48); and that the trust received income from farm rentals, from landowners' oil royalties under oil and gas leases on the lands at the inception of the trust, and from interest on contracts receivable, likewise acquired (R. 50). Although the evidence indicates (R. 62), and the taxpayer states (Br. 18), that the trustees made some efforts to sell part of the trust's farm lands, they never made any definite offers to sell any part of the property during the time it was under their supervision (R. 68).

Contrary to the taxpayer's contention that the trust was created equitably to distribute the grantor's estate (Br. 11–16), the foregoing demonstrates that the Board's findings are fully supported by substantial evidence. It is settled that findings, thus supported, will not be disturbed on review. *Phillips* v. *Commissioner,* 283 U. S. 589, 600; *Helvering* v. *Rankin,* 295 U. S. 123, 131.

All these facts manifest purposes and activities for which a corporation might have been formed for profit,

and that is the test laid down by the regulations. Article 801–3, Regulations 86. The form and mode of operation in which the business was carried on is not controlling. As this Court has held, "the true rule is that purpose and actual operation of the trust should be controlling in determining whether or not the trust shall be classified as an association for tax purposes". *Commissioner* v. *Vandergrift R. & Inv. Co.,* 82 F. (2d) 387, 390. The trustees had complete powers to carry on the business of the trust without the consent of the beneficiaries, much more so indeed than do the directors of a corporation who cannot do certain things without the consent of a majority of the stockholders. It makes no difference whether the trustees actually exercised all the authority given them by the trust instrument. The nature of the undertaking may not be considered narrower than that formally set forth in the agreement. *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369, 374. It was sufficient that the trustees used the powers that were actually necessary to manage and carry on the business. It is immaterial whether or not they used the additional powers given them by the trust instrument.

It is settled that the character of a trust is "determined by the terms of the trust instrument", rather than the particular activities engaged in during the taxable year. *Morrissey* v. *Commissioner,* 296 U. S. 344, 361; *Helvering* v. *Coleman-Gilbert, supra; United States* v. *Trust No. B. I. 35,* 107 F. (2d) 22 (C. C. A. 9th); *Marshall's Heirs* v. *Commissioner,* 111 F. (2d) 935 (C. C. A. 3d). Otherwise, the same organization

might be classed as an ordinary trust in one taxable year and as an association taxable as a corporation in another. *Sloan* v. *Commissioner,* 63 F. (2d) 666, 669 (C. C. A. 9th); *Commissioner* v. *Vandergrift R. & Inv. Co., supra.* No such anomalous result is intended by the statute.

Contrary to the taxpayer's contentions (Br. 14–16, 17–18), the trust is not shown by the evidence to have been a pure trust formed merely equitably to distribute the estate to the grantors' children and to hold and preserve the property and collect and distribute the income therefrom to the beneficiaries. The evidence shows that before the creation of the trust in 1935, the beneficiaries, together with their parents, were stockholders of the predecessor family corporation previously organized for the purpose of holding and operating the same family property and farm lands for the benefit of the stockholders. (R. 23–25, 47–49.) The trust was substituted for the corporation and thereafter operated for the benefit of the beneficiaries, some of whom were not competent to manage the property. (R. 37–38, 40, 48–49, 51–56.) In order to avoid corporate taxes, the stockholders dissolved the corporation (R. 37–38, 40) and established the trust (R. 24–25), which merely continued to carry on the business of the preceding corporation (R. 37–38, 40, 47–50). It was not a strict trust, therefore, wherein the trustees merely hold property for the collection of the income and its distribution among the beneficiaries. Rather it was a business trust organized to continue the business affairs of the prior family corporate organization for

the benefit of the parties in interest. It continued as a substitute for the former corporation, with the advantages but without the disadvantages of the latter, carrying on the activities and purposes for which another corporation might have been formed under similar circumstances for profit. It was therefore an association taxable as a corporation within the meaning of the statute. Article 801–3, Regulations 86.

The taxpayer apparently considers it material that the trust was created by the grantor rather than the beneficiaries. (Br. 15–16.) In *Morrissey* v. *Commissioner, supra*, the Supreme Court stated at page 357 that in order—

> * * * to provide a medium for the conduct of a business and sharing its gains * * *, a [business] trust may be created as a convenient method by which persons become associated for dealings in real estate, the development of tracts of land, the construction of improvements, and the purchase, management and sale of properties * * * where those who become beneficially interested * * * by joining in the plan at the outset, *or by later participation according to the terms of the arrangement, seek to share the advantages of a union of their interests in the common enterprise.* [Italics supplied.]

Accordingly, even though the beneficiaries herein were not apprised of the formation of the trust or some of them took no part in its organization or operation, as the testimony indicates (R. 51–61, 63–64), that is just as immaterial as if the grantors had formed a corporation to accomplish the same purposes and

issued to each of the children his or her shares of the outstanding stock. The non-managing beneficiaries were notified by the principal trustee of their "expectancy fractions", representing their respective shares of interest in the trust (R. 25–26, 91–92), and received or were entitled to their *pro rata* shares of income (R. 61, 67; Br. 18, 19). Therefore, though passive (R. 38, 61, 67), they must be deemed to have been voluntary members of the association just as much as if they had executed the trust themselves. The statute treats such a trust as an association, whether the beneficiaries formed the trust or acquired an interest by purchase or otherwise in an existing trust. Regulations 86, Article 801–3; *Morrissey* v. *Commissioner, supra.*

There have been several cases in which the participating beneficiaries have been given the business in trust instead of creating it themselves. Such organizations have been held to be ordinary business trusts or associations taxable as a corporation irrespective of the fact that they were created by a parent of the beneficiaries, without any voluntary action on their part. *Solomon* v. *Commissioner,* 89 F. (2d) 569, 571 (C. C. A. 5th), certiorari denied, 302 U. S. 692; *Commissioner* v. *Vandergrift R. & Inv. Co.,* 82 F. (2d) 387 (C. C. A. 9th); cf. *Commissioner* v. *Guitar Trust Estate,* 72 F. (2d) 544 (C. C. A. 5th), *contra,* which was disregarded by this Court in the *Vandergrift* case (p. 391) because of the rule laid down in the *Morrissey* case; and was not followed by the Circuit Court of Appeals for the Fifth Circuit in its later decision

in the *Solomon* case. Thus, it is apparent there need be no affirmative voluntary action on the part of the beneficiaries at the time of the creation of the trust in order to constitute an association. Merely associating themselves, voluntarily or involuntarily, at any time in a joint enterprise to do business for income or profit is sufficient to constitute a statutory association.

Contrary to the taxpayer's contention that the trust is essentially a liquidating trust (Br. 14–15), the evidence fails to show that the grantors intended to create the trust merely or primarily to preserve, divide and distribute the family estate. If the grantors had merely liquidation in mind upon creating the trust, there would have been no occasion for providing all the powers characteristic of a corporate going concern, notice of the beneficiaries' "expectancy fractions" or shares of interest, centralized control, limitation of liability, continuity of interest, and all the other provisions making it an organization doing business for profit like a corporation. Therefore, "there is no basis therein to conclude that this was purely a liquidating trust". *United States* v. *Rayburn,* 91 F. (2d) 162, 167 (C. C. A. 8th). Moreover, as was stated in that case (p. 168), we can find in the present trust no pure holding company such as in *Lewis & Co.* v. *Commissioner,* 301 U. S. 385, relied upon by the taxpayer (Br. 17). That case is distinguishable in that therein no certificates of beneficial interest were ever issued; the trust was for the benefit of definitely named persons, including the grantor, for

the sole purpose of subdividing and selling the land; the rights of the agent as a beneficiary were limited to commissions on property sold; the trustee's duties were purely ministerial with no power to control, direct or participate in the conduct of the selling enterprise contemplated by the contract; and the Supreme Court said that the presence of the trustee and the agent would not, under such circumstances, create an association out of an individual owner of real estate. Neither can we find any purely liquidating trust herein as in *Commissioner* v. *Morriss R. Co. Trust No. 2,* 68 F. (2d) 648 (C. C. A. 7th), and *Commissioner* v. *Atherton,* 50 F. (2d) 740 (C. C. A. 9th).

It has already been shown that the trust was designed for the purpose of, and we submit that its activities actually constituted, "doing of and engaging in business". *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503, 516–517. Moreover, as was held in *Solomon* v. *Commissioner, supra* (p. 571), "The facts found indicate that an extensive and profitable business is conducted which requires constant attention" of the trustee. It is settled that "doing business" is the important test. *Morrissey* v. *Commissioner,* 296 U. S. 344; *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369; *Swanson* v. *Commissioner,* 296 U. S. 362; *Helvering* v. *Combs,* 296 U. S. 365; *Hecht* v. *Malley,* 265 U. S. 144; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *United States* v. *Rayburn,* 91 F. (2d) 162 (C. C. A. 8th); *Solomon* v. *Commissioner,* 89 F. (2d) 569 (C. C. A. 5th), certiorari denied, 302 U. S. 692; *Tyson* v. *Commissioner,* 68 F. (2d) 584 (C. C. A. 7th), certiorari denied, 292 U. S.

657; *Willis* v. *Commissioner,* 58 F. (2d) 121 (C. C. A. 9th); *Trust No. 5833, Security-First Nat. Bank* v. *Welch,* 54 F. (2d) 323 (C. C. A. 9th), certiorari denied, 286 U. S. 544; *Sloan* v. *Commissioner,* 63 F. (2d) 666 (C. C. A. 9th); cf. *Gardiner* v. *United States,* 49 F. (2d) 992 (C. C. A. 1st).

The present case is a much weaker one for the taxpayer than was *United States* v. *Rayburn, supra,* where the trust was organized to hold a tract of land to await future opportunities, carry on the same business as previously, collect the rents and profits and, differently from the instant case, *to sell when a favorable price might be obtainable, and to liquidate.* The court there held it was not merely a holding company or purely a liquidating trust, and that since there were present enough of the elements of a corporation to be classified as an association and the purposes of the trust were identical with those of a corporation, it was taxable as a corporation. The facts there showed that the corporation, after having leased its lands and discovering that there was doubt as to its capacity legally to hold title satisfactorily to oil leases, conveyed its lands to a trust formed by the stockholders. In holding that the trust was engaged in a business enterprise for profit as distinguished from the activity of a purely liquidating trust, the court pointed out that it was created in immediate connection with the leasing of the lands for a long term of years and that obviously the creators of the trust intended to carry on the same business as they had been carrying on under the former company.

The court, reversing the District Court, stated (pp. 166, 167–168):

> The only business carried on by the trustee was the making of these leases; the collection of bonuses and rentals (oil and gas); and distribution of the net proceeds to the beneficiaries. * * *
>
> During the trust, no additional land has been acquired; there has been no development of the land by the trustees. * * *
>
> The trial court found that during these tax years the trustees were not "engaged in carrying on a business enterprise for profit as the main purpose of the organization"; and that "such business as they have done has been incidental to the ultimate liquidation of the property as provided in the trust deed. * * *"
>
> * * * We think no such situation is here present. If we consider the trust instrument alone and apart from all other evidence, there is no basis therein to conclude that this was a purely liquidating trust. That instrument, considered alone, reveals twenty-four tenants in common of a large tract of land conveying it to seven of their number as trustees to be disposed of by the trustees at any time within twenty years after the death of the survivor of such trustees; the trustees given the full powers as of ownership to manage and control the land and all parts thereof until final disposition; provisions for succession as to trustees; provision for unlimited modification of the trust by the trustees and two-thirds in interest of the beneficiaries. The only feature which might suggest a purely liquidation trust or a holding

> trust is that the *corpus* is a definite tract of land and the main purpose is to dispose of that land. In the leading case of *Morrissey* v. *Commissioner,* 296 U. S. 344, 360, 56 S. Ct. 289, 80 L. Ed. 263, and the companion case of *Swanson* v. *Commissioner,* 296 U. S. 362, 365, 56 S. Ct. 283, 80 L. Ed. 273, a single tract of land was involved. It is true that each of those cases dealt with trusts which contemplated improvement of the land before sale. However, it is obvious that the sale of land without prior improvement is as much a business enterprise for profit as any other business undertaking. * * * * * * * we must conclude that it was taxable as an association within the meaning of Secs. 13 (a) and 701 (a) (2) of the Revenue Act of 1928, 26 U. S. C. A., Secs. 13 (a) and note 1696 (3), for the two years involved here.

We submit that under the facts herein, the case is concluded by the rules laid down by the Supreme Court in *Morrissey* v. *Commissioner, supra; Helvering* v. *Coleman-Gilbert, supra; Swanson* v. *Commissioner, supra;* and *Helvering* v. *Combs, supra.*[1] The controlling force of those decisions was recognized by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Rayburn, supra* (pp. 167–168). Those cases arose under the provisions of the Revenue Acts of 1924, 1926, and 1928, relating to the taxability of certain classes of trusts as associations or corporations instead of as strict trusts, and the provisions of those

[1] These cases explain and modify *Crocker* v. *Malley*, 249 U. S. 223. See *Solomon* v. *Commissioner*, 89 F. (2d) 569, 571 (C. C. A. 5th), certiorari denied, 302 U. S. 692.

statutes are substantially the same as those of the Revenue Act of 1934, here involved.

In each of those cases, the trustees had absolute control and management of the trusts, as in this case. The trust property comprised a golf course with an adjoining real estate subdivision in the *Morrissey* case; about twenty apartment houses in the *Coleman-Gilbert* case; a single apartment house in the *Swanson* case; and a single oil lease in the *Combs* case. The trustees' powers were strikingly similar to those of the trustee here. Moreover, the beneficiaries' interests in each of those trusts (except in the *Coleman-Gilbert* case), evidenced by certificates or shares of interest, were personal property and did not terminate the trust at death; and the trustees could not bind the beneficiaries personally, nor were they individually liable except for willful misconduct. In the *Coleman-Gilbert* case, there were no shares of beneficial interest, no meetings, and no corporate records. In the *Swanson* case, where the trust property comprised a single apartment house, *the trustees never held formal meetings,* kept no minute books, had no by-laws, elected no officers, and the operations of the business did not extend beyond the property first acquired. In the *Combs* case, the trust had no office or place of business, no seal, by-laws, or official name, and the trustees' operations were confined to the one lease acquired.

So there is a striking analogy between the determinative elements in those cases and those in the present case—all were actually doing business of one sort or another; continuity, limitation of liability, and cen-

tralized control existed; and the essential characteristics of an association are present in each case.

The activities enumerated in the *Morrissey* and related cases do not by any means comprise the sole activities which constitute the carrying on of a business in an organized capacity sufficient to create a taxable association. Those cases show that any activities which amount to more than a mere passive holding of property and a receipt of the income therefrom are sufficient to constitute the carrying on of a business. In the case at bar, the purposes of the formation of the trust as well as the activities carried on, amounted to much more than mere protection, conservation, and distribution of the property. Even where the trustee's sole functions in connection with the oil produced from the trust's oil leases were to collect, care for and dispose of the oil, this Court held such activities constituted doing business for profit so that the trust was taxable as a corporation. *United States* v. *Trust No. B. I. 35, Etc.,* 107 F. (2d) 22 (C. C. A. 9th), reversing 25 F. Supp. 608 (S. D. Cal.), citing, by comparison, *Commissioner* v. *Boeing,* 106 F. (2d) 305, 309 (C. C. A. 9th). It has been held too, that a trust formed merely to operate—leasing to others—a property owned by four heirs was a business trust taxable as a corporation. *Marshall* v. *Commissioner, supra.* Lack of size and complexity do not prevent a trust from being taxable as a corporation. *United States* v. *Trust No. B. I. 35, Etc., supra.* The fact that the trustees conducted the instant trust in some respects substantially in the same manner as

many other trusts are conducted, does not in anywise show that this was a strict trust rather than one taxable as an association. Moreover, as to the taxpayer's intimation that it is significant that the trustees held no formal meetings with or without beneficiaries and did not advise them as to the conduct of the affairs of the trust (Br. 18), it is settled that no formal meetings are necessary. *Swanson* v. *Commissioner, supra.* Although the use of corporate forms may furnish persuasive evidence of the existence of an association, nevertheless the absence of particular forms or of the usual terminology of corporations cannot be regarded as decisive. *Morrissey* v. *Commissioner, supra; Commissioner* v. *Vandergrift R. & Inv. Co., supra.* Nor is there any necessity for a strict observance of the usual corporate forms or methods of doing business for they are not conclusive. *Fidelity-Bankers Trust Co.* v. *Helvering,* 113 F. (2d) 14, 17 (App. D. C.); *Helvering* v. *Washburn,* 99 F. (2d) 478, 481 (C. C. A. 8th).

The ultimate question is whether an ancestral trust set up for the purpose of doing business in quasi-corporate form is to be classed as an association. The decisions of the Circuit Courts of Appeals, prior to the *Morrissey* case, appear to be conflicting. Cf. *Willis* v. *Commissioner, supra,* involving a trust created by will, with *Blair* v. *Wilson Syndicate Trust,* 39 F. (2d) 43 (C. C. A. 5th), and *Commissioner* v. *Guitar Trust Estate,* 72 F. (2d) 544 (C. C. A. 5th). See also *Roberts-Solomon Trust Estate* v. *Commissioner,* 34 B. T. A. 723, affirmed *sub nom. Solomon* v. *Commissioner,* 89

F. (2d) 569 (C. C. A. 5th), certiorari denied, 302 U. S. 692, where the Board of Tax Appeals rejected (p. 725) the argument that a trust did not fall within the definition of the *Morrissey* case because the beneficiaries were given the business instead of creating it themselves. We have already shown that the decisions of the Supreme Court in the *Morrissey* and related cases are sufficiently broad to answer the question affirmatively in harmony with our contentions.

In *Commissioner* v. *Vandergrift R. & Inv. Co.,* 82 F. (2d) 387 (C. C. A. 9th), the trust during 1924–1926 owned a substantial interest in a shoe business which was liquidated in 1927. During the period 1927–1930, however, the trust merely received and distributed rentals from a long-term lease and accumulated a reserve fund which was invested in building and loan certificates. The Board of Tax Appeals had there held that the trust was taxable as an association for the earlier but not the later period. This Court, however, held that under the rules laid down by the Supreme Court in the *Morrissey, Swanson, Coleman-Gilbert* and *Combs* cases, *supra,* the trust was taxable as an association for all of the years involved notwithstanding the fact that the trust had completed the liquidation of the shoe business which it had formerly managed.

That case, insofar as it involved the element of liquidation, was a much stronger one for the taxpayer than is the present case, but this Court nevertheless properly held that the trust was taxable as an association.

In *United States* v. *Trust No. B. I. 35, Etc.,* 107 F. (2d) 22 (C. C. A. 9th), this Court, reversing the District Court (25 F. Supp. 698 (S. D. Cal.)), held that the trust there owning oil lands was an association taxable as a corporation on its income for the years 1931–1933, and that the functions of the trustees with reference to the collection, care and disposal of the oil produced from its leases constituted a business for profit even though conducted through an agent.

The taxpayer relies (Br. 14, 19) on *United States* v. *Davidson,* 115 F. (2d) 799 (C. C. A. 6th). That case, however, is distinguishable. There the grantor conveyed his properties in trust for his four children as beneficiaries. Although the trust had some of the characteristics of a corporation, there was no conclusive evidence that it was a business venture. Rather the court found that the trust was formed primarily for liquidation of the settlor's property and therefore it was not taxable as an association under Section 801 (a) (2) of the Revenue Act of 1934. The trust instrument there expressly declared (p. 800) that "the primary purpose of the trust is the conversion of the trust property into money and the distribution of the net proceeds among the persons [the children] holding certificates of shares in proportion to their holdings as hereinafter provided". The trust was to be terminated upon the death of the last of the grantor's children or at any time earlier, in the discretion of the trustee, by liquidation, distribution or transfer to a corporation or a partnership, and the trustee began making large distributions during the

taxable years there involved. The District Court found that the trust was not a business venture, but was formed primarily for liquidation of the settlor's property. The court further found that its activities were only incidental to liquidation and distribution of the trust estate, and that large distributions had already been made. The court therefore concluded that the trust was not an association taxable as a corporation. The Circuit Court of Appeals affirmed on the ground that the lower court's findings were supported by substantial evidence. The Board's findings are to the contrary in the instant case, and we submit that they should likewise be accepted as supported by substantial evidence.

In summary, we believe the following conclusions are justified. The primary purpose of the trust here involved was not merely liquidation with incidental activities necessary to preservation of the property, as contended by the taxpayer. Rather, as the great weight of the evidence shows, the trust was created primarily to carry on the family business enterprises intact as going concerns for profit. The trustees had absolute control and management over the property of the trust, more so than officers or directors of a corporation. They were invested with all the powers necessary to borrow money, make loans, make investments from current income of the trust, and every other possible power a corporation could have. Therefore, under the judicial authorities cited, the trust was an association and taxable as a corporation, as determined by the Commissioner and held by the Board.

CONCLUSION

The decision of the Board of Tax Appeals is correct and should therefore be affirmed.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
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GERALD L. WALLACE,
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Special Assistants to the Attorney General.

APRIL, 1942.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 801. DEFINITIONS.

(a) When used in this Act—

(1) The term "person" means an individual, a trust or estate, a partnership, or a corporation.

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * *

(U. S. C., Title 26, Sec. 1696.)

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 801–1. *Classification of taxables.*—For the purpose of taxation the Act makes its own classifications and prescribes its own standards of classification. Local law is of no importance in this connection. Thus a trust may be classed as a trust or as an association (and, therefore, as a corporation), depending upon its nature or its activities. (See article 801–3.) * * * The term "corporation" is not limited to the artificial entity usually known as a corporation, but includes also an association, a trust classed as an association because of its nature or its activities, a joint-stock company, an insurance company, and certain kinds of partnerships. (See articles 801–2 and 801–4.) The definitions, terms, and classifications, as set forth in section 801, shall have the same respective meaning and scope in these regulations.

ART. 801–2. *Associations.*—The term "association" is not used in the Act in any narrow or technical sense. It includes any organization, created for the transaction of designated affairs,

or the attainment of some object, which, like a corporation, continues notwithstanding that its members or participants change, and the affairs of which, like corporate affairs, are conducted by a single individual, a committee, a board, or some other group, acting in a representative capacity. It is immaterial whether such organization is created by an agreement, a declaration of trust, a statute, or otherwise. It includes a voluntary association, a joint-stock association or company, a "business" trust, a "Massachusetts" trust, a "common law" trust, an "investment" trust (whether of the fixed or the management type), an interinsurance exchange operating through an attorney in fact, a partnership association, and any other type of organization (by whatever name known) which is not, within the meaning of the Act, a trust or an estate, or a partnership. * * *

ART. 801–3. *Association distinguished from trust.*—The term "trust," as used in the Act, refers to an ordinary trust, namely, one created by will or by declaration of the trustees or the grantor, the trustees of which take title to the property for the purpose of protecting or conserving it as customarily required under the ordinary rules applied in chancery and probate courts. The beneficiaries of such a trust generally do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. Even though the beneficiaries do create such a trust, it is ordinarily done to conserve the trust property without undertaking any activity not strictly necessary to the attainment of that object.

As distinguished from the ordinary trust described in the preceding paragraph is an arrangement whereby the legal title to the property is conveyed to trustees (or a trustee) who, under a declaration or agreement of trust, hold and manage the property with a view to income or profit for the benefit of beneficiaries. Such

an arrangement is designed (whether expressly or otherwise) to afford a medium whereby an income or profit-seeking activity may be carried on through a substitute for an organization such as a voluntary association or a joint-stock company or a corporation, thus obtaining the advantages of those forms of organization without their disadvantages.

If a trust is an undertaking or arrangement conducted for income or profit, the capital or property of the trust being supplied by the beneficiaries, and if the trustees or other designated persons are, in effect, the managers of the undertaking or arrangement, whether the beneficiaries do or do not appoint or control them, the beneficiaries are to be treated as voluntarily joining or cooperating with each other in the trust, just as do members of an association, and the undertaking or arrangement is deemed to be an association classified by the Act as a corporation.

By means of such a trust the disadvantages of an ordinary partnership are avoided, and the trust form affords the advantages of unity of management and continuity of existence which are characteristic of both associations and corporations. This trust form also affords the advantages of capacity, as a unit, to acquire, hold, and dispose of property and the ability to sue and be sued by strangers or members, which are characteristic of a corporation; and also frequently affords the limitation of liability and other advantages characteristic of a corporation. These advantages which the trust form provides are frequently referred to as resemblance to the general form, mode of procedure, or effectiveness in action, of an association or a corporation, or as "quasi-corporate form." The effectiveness in action in the case of a trust or of a corporation does not depend upon technical arrangements or devices such as the appointment or election of a president, secretary, treasurer,

or other "officer," the use of a "seal," the issuance of certificates to the beneficiaries, the holding of meetings by managers or beneficiaries, the use of a "charter" or "by-laws," the existence of "control" by the beneficiaries over the affairs of the organization, or upon other minor elements. They serve to emphasize the fact that an organization possessing them should be treated as a corporation, but they are not essential to such classification, for the fundamental benefits enjoyed by a corporation, as outlined above, are attained, in the case of a trust, by the use of the trust form *itself*. The Act disregards the technical distinction between a trust agreement (or declaration) and ordinary articles of association or a corporate charter, and all other differences of detail. It treats such a trust according to its essential nature, namely, as an association. This is true whether the beneficiaries form the trust or, by purchase or otherwise, acquire an interest in an existing trust.

The mere size or amount of capital invested in the trust is of no importance. Sometimes the activity of the trust is a small venture or enterprise, such as the division and sale of a parcel of land, the erection of a building, or the care and rental of an office building or apartment house; sometimes the activity is a trade or business on a much larger scale. The distinction is that between the activity or purpose for which an ordinary strict trust of the traditional type would be created, and the activity or purpose for which a corporation for profit might have been formed.

U. S. GOVERNMENT PRINTING OFFICE: 1942

NO. 9946

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANK BOGART,

Appellant

vs.

MILLER LAND and LIVESTOCK COMPANY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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MESSRS. GUNN, RASCH & GUNN,

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Attorneys for Frank Bogart, Creditor, and Appellant. [1*]

In the District Court of the United States in and for the District of Montana.
Billings Division.

Case No. 3406.

In the Matter of MILLER LAND AND LIVESTOCK COMPANY,

Debtor.

Be It Remembered that on June 7, 1938, there was filed before the Honorable D. L. Egnew, Conciliation Commissioner for Big Horn County, Montana, in the above entitled matter, a Proposal under Section 75 of the Bankruptcy Act as amended, by the debtor in the above entitled matter, which proposal is in the words and figures following, to wit: [2]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

EXHIBIT #2

12-15-1938

In the District Court of the United States for the District of Montana
(Billings Division)

Before the Honorable D. L. Egnew, Conciliation Commissioner in and for the County of Big Horn, State of Montana.

In the Matter of

MILLER LAND AND LIVESTOCK COMPANY,
Farm Debtor.

PROPOSAL

Debtor proposes to pay all creditors in full. All it asks is a relatively short time to bring about an orderly liquidation of certain assets and an opportunity to continue its operations for a time free of vexatious and expensive litigation. In order to do so, debtor proposes to its secured creditors that it continue to possess, farm and care for its property, including livestock, according to good farming, ranching, and livestock practices and under the supervision of the Court and hereby offers and agrees so to do and out of the proceeds of each year's operation, take out and pay: First, the prudent and necessary cost of production of crops and of operation and maintenance of farm, ranch, and livestock; second, an amount sufficient to pay and to pay at least one year's taxes on all encumbered property;

third, to pay over and account to the Conciliation Commissioner, commencing with the year 1938, such net income on or before December 1st each year, which such net income debtor estimates, from past production will, during the next three years, average, as more fully appears by the schedules hereto attached, at least $150,000.00 per year, such income to be apportioned and paid over to the several secured creditors to the full amount of their allowed claims, with interest, and in accordance with such priorities, equities, and prorations as may be agreed upon by the creditors or determined by the Conciliation Commissioner or the Court to be just and in accordance with what the interests of the various secured creditors may be; (unpaid balances to bear interest at the existing contract rate); it being the intention and proposal of the debtor to apply on such payments all income over and above the reasonable and necessary cost of operation of the farm, ranch, equipment, livestock, and taxes, and to pay each creditor in full as soon as possible and that in case the application of such income does not pay within three years the amount of said debt, with interest as contracted for, that debtor will, before the expiration of three years from the acceptance and approval of this proposal, refinance such remaining amount by securing a loan or loans or disposing of property under the supervision of the Court, or both, sufficient to complete such payments.

All the property to be managed under the supervision of the Court and the present President and

Manager of said debtor corporation, by executing this Proposal, hereby agrees to accept such responsibility and management and to serve under the general supervision of the Court without payment of wages or salary to himself for such management, but providing that he receive such reimbursement for expenses as he may necessarily incur in carrying out such duties.

In order that the plan of operation for 1938 be specified more in detail, the schedule hereunto annexed and marked "Schedule A" is a statement of the existing, unencumbered crops now growing upon the property of the debtor, and the probable returns therefrom. [3]

The hereunto annexed schedule marked "Schedule B" is the proposed plan of handling and marketing the livestock, mortgaged and unmortgaged.

The hereunto annexed schedule marked "Schedule C" is a proposed plan of liquidating certain other secured claims on real estate.

It is proposed further that the payments made to any secured creditor during any one year shall be not less than an amount equal to a reasonable and customary rental upon the property upon which such creditors hold security, or at the option of the several creditors, a payment equal to 10% of the debt, and that there be established and maintained out of any net income in excess of an amount necessary to make such minimum required payments as above proposed, a revolving fund of $40,000.00 for operating expenses, to be used under the supervision

of the Court, and in general accordance with "Schedule D", hereunto annexed.

Debtor proposes to the unsecured creditors that it continue its operations in general accordance with the terms of the proposal heretofore stated and that out of the net proceeds of such operations or proceeds of sales or loans secured, that less than 12 months after the secured creditors have been paid in full, as above proposed, that it pay to such several unsecured creditors 100% of their allowed claims with interest at the rate of 5% *per cent* per annum.

Inasmuch as debtor proposes that its operations be conducted under the supervision of the Court, it offers and agrees to pay as much of the cost of such supervision as it is allowed by the law to pay, which debtor understands to be 50% and agrees that the Court may fix such compensation at any reasonable amount. Debtor suggests that $..... per month would be a reasonable amount to pay for such supervision.

Debtor proposes and has pending in this Court, a petition to secure temporary working capital of $40,000.00 or so much thereof as may be necessary by pledging its growing crops until the same may be marketed.

This proposal is made on behalf of said debtor, pursuant to and as authorized by the Board of Directors of said Corporation at a special meeting of such Directors held at the office of said debtor Corporation at Parkman, Wyoming, May 31st, 1938.

The foregoing proposal is believed by the debtor

to be a fair, equitable, and feasible plan of liquidation of its debts and that its operation will result in the rehabilitation of the debtor, but during the entire proceeding, intends to and will consider any and all reasonable suggestions of any creditor that may tend to better accomplish such results. Debtor tenders and asks for all reasonable cooperation in this proceeding to carry out the intent of the law governing this proceeding.

Wherefore, debtor prays that this proposal be considered by the creditors and, if approved according to law, that such further proceedings may be had as are proper.

MILLER LAND AND LIVESTOCK COMPANY, A Corporation

By C. E. MILLER, JR.,

[Corporate Seal] President [4]

SCHEDULE "A"

Crop and Feed Inventory

On Hand:

Approximately	1,000	tons Hay
"	3,000	bu. Barley
"	50,000	lb. Alfalfa Seed in Stack

Drilled in:

Approximately	5,000	acres	Winter Wheat—excellent condition
"	500	"	Spring Wheat—excellent condition
"	2,000	"	Barley—excellent condition
"	600	"	Sugar Beets (Share Basis)—excellent condition
"	4,000	"	Hay, mixed—excellent condition

Sufficient pasture land at Home Ranch to carry 6,000 head of cattle.

Estimated Income:

5,500 acres Wheat, 25 bu. per acre—137,500 bu. at 70¢	$ 96,250.00
2,000 " Barley, 35 bu. per acre—70,000 bu. at 50¢	35,000.00
600 " Sugar Beets—net $12.00 per acre	7,200.00
Soil Conservation payment (estimated)	10,000.00
7,000 tons Hay at $4.00 per ton	28,000.00
600 acres Beet Tops at $3.00 per acre	1,800.00
Total Estimated Gross Crop Income:	$178,250.00

All of the above is free and clear of encumbrance. Inasmuch as 2,000 acres of winter wheat is nurse crop to 2,000 acres, new alfalfa and hay land for 1939 will be about the same as 1938.

Beet contract calls for planting of 2500 acres for 1939 (all cost carried by contractors).

Schedule of Operation—1939

2500 acres Sugar Beets*
4000 " Hay
5700 " Grain

*1940 program provides for 3500 acres of sugar beets, per contract.

[5]

SCHEDULE "B"

Livestock

(Inventory as of June 1, 1938)

Our and Others:

550 cows and calves estimated at		$65.00	$35,750.00
335 dry cows	" "	55.00	18,425.00
233 2-yr. old steers	" "	40.00	9,320.00
28 " " heifers	" "	35.00	980.00
50 4-yr. old steers	" "	80.00	4,000.00
1196			$ 68,475.00

Aberdeen Angus:				
800	cows and calves, estimated at	$ 70.00	$56,000.00	
1156	dry cows, bred, estimated at	55.00	63,530.00	
400	2-yr. old steers, " "	45.00	18,000.00	
373	" " heifers " "	40.00	14,920.00	
400	yearling heifers " "	50.00	12,000.00	
400	" steers " "	35.00	14,000.00	
166	black bulls " "	100.00	16,600.00	
3695				195,050.00
2 A Cattle:				
75	mixed cattle estimated at	$50.00		3,750.00
	Estimated Total Cattle Value:			$267,275.00
Cattle sold to which we hold title:				
	E. C. Woodley			
200	cows, some calves)		$6,300.00	
200	yearlings)Balance due 12/1/38			
	Paul Workman			
2	bulls)			
107	cows, some calves)		5,666.76	
82	yearlings)Balance due 12/1/38			
	Walter Bales, Jr.			
60	cows and calves)		3,730.00	
2	bulls)Balance due 12/1/38			
2	saddle horses)			
Estimated accrued interest on balance due			450.00	$ 16,146.76
	Estimated Total Cattle Value and Balance Due From Sales:			283,421.76
4966 head of cattle, plus approximately 1600 calves, now on property owned or leased by Miller Land & Livestock Company.				
Horses				$ 27,000.00
Chickens and Hogs				1,000.00
	Estimated Total Livestock Inventory Value:			$311,421.76

Program for 1938

To maintain proper breeding herd to utilize feed produced, would recommend the following sales, Fall of 1938:

300	cows estimated at $40.00	$12,000.00
700	dry cows estimated at $60.00	42,000.00
50	4-yr. old steers estimated at $90	4,500.00
50	bulls estimated at $60.00	3,000.00
	Estimated Proceeds From Fall, 1938 Sales:	$ 61,500.00
	Cattle Sale Notes:	16,146.76
	Horses—200—estimated at $50.00	10,000.00
	Estimated Proceeds From Proposed Livestock Sales; Fall, 1938, Including Balance Due on Cattle Already Sold:	$ 87,646.76

[6]

Such proposed selling program would leave the following cattle on the property of the Miller Land and Livestock Co. as a breeding herd:

633	long 2-yr. olds estimated at $60.00	$ 37,980.00
2200	cows estimated at $55.00	121,000.00
2200	calves estimated at $25.00	55,000.00
400	long 3-yr. old steers estimated at $45	18,000.00
400	long 3-yr. old heifers " " $40	16,000.00
116	bulls estimated at $100.00	11,600.00
	Total Estimated Value:	$259,580.00

However, in the event that projected inventory prices can be obtained for all calves, yearlings, and two-year old steers, we would recommend selling them also in the Fall of 1938. This would enable debtor to pay all cattle indebtedness in the Fall of 1938. [7]

SCHEDULE "C"

REAL ESTATE

Property now owned valued at $2,500,000.00

Debtor proposes to sell the following real estate: Dayton Ranch, consisting of 837.5 acres, more or less, and lots in Town of Dayton, legal description as follows:

S½NE¼, SE¼NW¼, NE¼SW¼, SE¼, Section 19; SW¼SW¼, Section 20, NW¼, NE¼SW¼, S½NE¼, SE¼ except that part as platted in Town of Dayton, Section 29; NE¼NE¼, Section 30, Township 57 North, Range 86 West, containing 837.5 acres, more or less, according to U.S. Government Survey; also

Lots 1 and 2, Block 1; Lots 1 to 6 inc., 11 and 12, Block 2; Lots 1 to 7, inc., and 9 to 12, inc., Block 3, Dinwiddie Addition to the Town of Dayton, Sheridan County, Wyoming.

The above mentioned property is to be sold at a price of $100,000.00 on the following terms:

Purchaser to pay $5,000.00 now, $5,000.00 December 1, 1938, and $7,500.00 per year until the balance is fully paid, unpaid balance to draw interest at the rate of 4 per cent per annum. Purchaser further agrees to obtain full release of debtor of first mortgage on property, or to replace same, for the amount of $21,862.50. This would mean that debtor would realize full $10,000.00 on said property before December 1, 1938. Balance due debtor would be secured by a second mortgage.

T R Ranch, consisting of approximately 4500.00 acres, more or less, legal description as follows: Lots 1, 2, 3, 4, 5, 6, 7 and 8, Section 13; E½NE¼, Section 23; N½, E½SW¼, S½SE¼, NE¼SE¼, Section 24; NE¼, E½NW¼, SE¼, NE¼SW¼, Section 25; SE¼SE¼, Section 35; N½, SW¼, N½SE¼, SW¼SE¼, Section 36, Township 58 North, Range 89 West, containing approximately 4500.00 acres, more or less, according to U. S. Government Survey.

The above mentioned property, debtor proposes to sell at a price of $300,000.00, terms 10% down with the balance over a period of 10 years, drawing interest at the rate of 4 per cent per annum. [8]

SCHEDULE "D"
Operating Expense

Budget to December 1, 1938 (Estimated):

Leases	$ 5,000.00
Labor	9,600.00
Provisions	1,200.00
Repairs	500.00
Fuel	150.00
Taxes*	.....
Tractor Fuel, Gas & Oil	5,000.00
Equipment	10,000.00
Total	$31,450.00

*1937 taxes and current 1938 taxes to be adjusted and added to total shown above.

Budget, Year 1939 (Estimated):	
Leases	$ 5,000.00
Labor	15,000.00
Provisions	1,800.00
Repairs	1,000.00
Salt	250.00
Fuel	250.00
Taxes	4,400.00
Tractor, Fuel, Gas & Oil	8,000.00
*Reserve for Misc. Expense	4,300.00
Total	$40,000.00

*This item includes general maintenance of building, necessary travel expense, clerical and general office expense, necessary truck and car licenses and permits, etc., which cannot be estimated with reasonable accuracy.

[Endorsed]: Filed June 7, 1938, before D. L. Egnew, Conciliation Commissioner. [9]

Thereafter, on June 7, 1938, Claim of Frank Bogart, Creditor, was filed with the Conciliation Commissioner in the above entitled matter, which claim is in the words and figures following, towit: [10]

[Title of District Court and Cause.]

CREDITOR'S CLAIM

United States of America,
District of Montana—ss.

Frank Bogart, being first duly sworn, deposes and says:

That at the time of the filing of the petition by the debtor herein, he was, and is now, the owner and holder of and asserts a claim against the property of the debtor, as follows:

That on the 29th day of September, 1919, Edwin L. Dana and Fra M. Dana, his wife, made and delivered their four promissory notes, each for the sum of $50,000.00 and bearing interest at the rate of 7% per annum, and payable on the 1st day of October, 1924, to one Samuel McKennan, and amounting in the aggregate to the sum of $200,000.0 amounting in the aggregate to the sum of $200,-000.00, and, to secure the payment of said notes, on the same day executed, acknowledged and delivered to said Samuel McKennan a mortgage on lands, water rights, etc. in Sheridan County, Wyoming, which was recorded in the office of the County Clerk of Sheridan County, Wyoming on the 1st day of October, 1919, and a copy of which is hereto attached, marked Exhibit "A" and made a part hereof.

To further secure the payment of said promissory notes, the said E. L. Dana and Fra M. Dana, his wife, on the 29th day of September, 1919, executed, acknowledged and delivered to the said Samuel McKennan, a mortgage on lands, water rights,

etc. in Big Horn County, Montana, which was recorded in the office of the County Clerk and Recorder of Big Horn County, Montana, on the [11] 16th day of October, 1919, and a copy of which is hereto attached, marked Exhibit "B" and made a part hereof.

That thereafter and in the year 1926 there was released from the lien of said mortgage made a part hereof as Exhibit "A", by an instrument in writing executed for that purpose, Lots One (1) and Two (2) and the South Half of the Southeast Quarter (S½SE¼) of Section Fourteen (14), and the Northwest Quarter of the Northeast Quarter (NW¼NE¼) of Section Twenty-three (23), in Township Fifty-eight (58) North of Range Eighty-nine (89) West, Sheridan County, Wyoming, and the said E. L. Dana and Fra M. Dana, his wife, in consideration of such release and as further security for the payment of said promissory notes, executed, acknowledged, and delivered to the said Samuel McKennan a mortgage upon certain lands, with the appurtenances, in Sheridan County, Wyoming, which mortgage was recorded in the office of the County Clerk of Sheridan County, Wyoming, on the 11th day of October, 1926, and a copy of which is hereto attached, marked Exhibit "C", and made a part hereof.

That one of said notes for the sum of $50,000.00, with the interest thereon, has been fully paid and there is now due and owing on said indebtedness

evidenced by said promissory notes the sum of $150,000.00, with interest thereon at the rate of 6% per annum from the 1st day of October, 1937. That the three promissory notes evidencing said indebtedness unpaid are each, except as to their numbers, which are One, Two and Four respectively in the words and figures following:

United States of America

Number	First	Dollars
One	Mortgage	50,000.00

Note.

Secured By

Real Estate [12]

Helena, Montana, September 29th, 1919

On the first day of October, A. D. 1924 for value received I promise to pay to the order of Samuel McKennan at Union Bank and Trust Company, Helena, Montana, the principal sum of Fifty Thousand Dollars, with exchange on New York with interest thereon at the rate of seven per cent per annum from date until maturity, payable semi-annually according to the tenor of ten interest notes, annexed hereto and bearing even date herewith, both principal and interest to be paid in gold coin of the United States of the present standard of weight and fineness. If default be made in the payment of any interest note or any portion thereof at the time the same becomes due and payable, then said principal and accrued interest shall, at the option

of the legal owners thereof, become at once due and payable without further notice, with interest thereafter, at the rate of seven per cent per annum until paid.

This note shall bear interest at seven per cent per annum, after maturity, until fully paid. This note and interest notes annexed are secured by a First Mortgage Deed duly recorded in Sheridan County, State of Wyoming.

EDWIN L. DANA
FRA M. DANA

The makers hereof have the privilege of paying this note or any portion thereof, on any interest payment date, on or after October 1st, 1920.

($10.00 of U. S. Internal Revenue stamps attached—cancelled.)

That said notes were made and delivered and said mortgages given as security therefore by the said E. L. Dana and Fra M. Dana, his wife, in consideration of the loan of $200,000.00 made to them at the time of the delivery of said notes and mortgages attached hereto as Exhibits "A" and "B". [13]

That on the 11th day of October, 1919, the said Samuel McKennan endorsed, assigned and transferred to this affiant all of said promissory notes, and this affiant is now and ever since has been the owner and holder of said three promissory notes unpaid as aforesaid.

That on said 11th day of October, 1919, the said Samuel McKennan further assigned and transferred to this affiant the said mortgage on lands in Big

Horn County, Montana, a copy of which is attached hereto as Exhibit "B", together with the obligations secured thereby and the money due and to become due thereon, with interest, by an instrument in writing duly executed and acknowledged by him and recorded in the office of the County Clerk and Recorder of Big Horn County, Montana, on the 20th day of March, 1934, in Book 18 of Mortgages, at page 467; and on the same day duly assigned and transferred to this affiant the mortgage on lands in Sheridan County, Wyoming, made a part hereof as Exhibit "A", together with the promissory notes secured thereby, by an instrument in writing duly executed and acknowledged by him, which was recorded in the office of the County Clerk of Sheridan County, Wyoming, on the 16th day of March, 1934, in Book 37 of Mortgages, at page 205. That this affiant is now and has been ever since the 11th day of October, 1919, the owner and holder of both of said mortgages and the promissory notes secured thereby.

That on the 20th day of October, 1932, and within eight years and sixty days after the maturity of said promissory notes, the said Samuel McKennan made his certain affidavit for the purpose of renewing and extending the said mortgage of lands in Big Horn County, Montana, setting forth the date of said mortgage, when and where recorded, the amount of the debt secured thereby and the amount remaining unpaid, to-wit, the sum of $150,000.00, with interest from the 1st day of October, 1931, [14] at

the rate of 7% per annum, and stating that said mortgage was not renewed for the purpose of hindering, delaying or defrauding creditors of the mortgagors or the owners of the lands described therein, which affidavit was filed for record in the office of the County Clerk and Recorder of Big Horn County, Montana, on the 22nd day of October, 1932, and recorded in said office in Book 18 of Mortgages, at page 162.

That the said mortgage dated the 21st day of July, 1926, and a copy of which is made a part hereof as Exhibit "C", thru error designated said Samuel McKennan as mortgagee, whereas said mortgage should have designated this affiant as mortgagee and this affiant is, in fact, the owner and holder of said mortgage.

That on or about the 1st day of October, 1933, this affiant agreed with the makers of said notes, to-wit: E. L. Dana and Fra M. Dana, his wife, to reduce the rate of interest on said notes to 6% per annum.

That the interest on said three promissory notes has been paid to the 1st day of October, 1937, on which date the sum of $1500.00 was paid as interest upon each of said promissory notes.

That there are no set-offs to or counter-claims against said indebtedness and there never has been any judgment rendered thereon or any part thereof.

That as affiant is informed, believes and states all of the lands and property embraced in and described in said mortgages has been transferred and con-

veyed to the debtor, who now claims to be the owner thereof.

FRANK BOGART

Subscribed and sworn to before me this 5th day of May, 1938.

A. A. MAJOR

Notary Public for the State of Montana residing at Helena, Montana.

My commission expires Feb. 28, 1940.

(Notarial Seal) [15]

EXHIBIT "A"

This Deed, made this 29th day of September in the year of our Lord One Thousand Nine Hundred Nineteen, between Edwin L. Dana (who received title to some of the lands hereinafter described, as E. L. Dana) and Fra M. Dana, his wife, of the County of Sheridan, in the State of Wyoming, parties of the first part, and Samuel McKennan of Lewis and Clark County, State of Montana, party of the second part,

Witnesseth, That said parties of the first part, for and in consideration of the sum of Two Hundred Thousand Dollars, to them in hand paid, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto said party of the second part, and unto his heirs, executors, administrators and assigns forever, all those pieces or parcels of land, situate, lying and being in the

County of Sheridan, and State of Wyoming, more particularly described as follows:—

North half (N½), Southwest quarter (SW¼) and West Half of Southeast quarter (W½SE¼) of Section Three (3); all of Section Four (4); all of Section Five (5); all of Section Six (6); Northeast Quarter of Northwest Quarter (NE¼NW¼) and Lots One (1), Two (2) and Three (3), East half of Northeast quarter (E½NE¼), Northeast Quarter of Southeast quarter (NE¼SE¼) and all that portion of the Southwest quarter of Northeast quarter (SW¼NE¼), Northwest quarter of Southeast quarter (NW¼SE¼) and Southeast quarter of Southeast quarter (SE¼SE¼) lying east of the County Road as now constructed thru said land, all in Section Seven (7); Northwest quarter (NW¼) of Section Eight (8); and Northeast quarter (NE¼) of Section Nine (9); all in Township Fifty-seven (57) North, Range Eighty-seven (87) West, Wyoming Meridian;

South Half of Southeast Quarter (S½SE¼) and South half of Southwest quarter (S½SW¼) of Section One (1); North half (N½) and Northeast quarter of Southeast quarter (NE¼SE¼) of Section Twelve (12); all in Township Fifty-seven (57) North, Range Eighty-eight (88) West, Wyoming Meridian;

South half of Southeast quarter (S½SE¼) (or Lots 5 & 6), Southwest quarter (SW¼)

or Lots 2, 3 & 4) in Section Fifteen (15); Southeast quarter of Southeast Quarter (SE¼SE¼) (or Lot 6), Southwest quarter (SW¼) (or Lots 2, 3, & 4) of Section Seventeen (17); South Half (S½) (or Lots 1, 2, 3, 4, 5, & 6) of Section Eighteen 18); all of Section Nineteen (19); Northeast quarter of Northeast quarter (NE¼NE¼), Southwest quarter of Northeast quarter (SW¼NE¼), Northwest quarter of Northwest quarter (NW¼NW¼), South half of Northwest quarter (S½NW¼), and South half (S½) of Section Twenty [16] (20); Northeast quarter (NE¼), North half of Northwest quarter (N½NW¼), Southeast quarter of Northwest quarter (SE¼NW¼), Southwest quarter (SW¼) and North Half of Southeast quarter (N½SE¼) of Section Twenty-one (21); West half of Northeast quarter (W½NE¼), Northwest quarter (NW¼), North half of Southwest quarter (N½ SW¼) and West half of Southeast quarter (W½SE¼) of Section Twenty-two (22); Northeast quarter (NE¼), South half of Northwest quarter (S½NW¼) and South half (S½) of Section Twenty-seven (27); West half of Northeast quarter (W½NE¼), Northwest quarter (NW¼) and East half of Southeast quarter (E½SE¼) of Section Twenty-eight (28); Northeast quarter (NE¼), Northwest quarter of Northwest quarter (NW¼NW¼), South half of Northwest quar-

ter (S½NW¼) and South half (S½) of Section Twenty-nine (29); North half (N½), North Half of Southeast quarter (N½SE¼) and North half of Southwest quarter (N½SW¼) of Section Thirty (30); South half of Northeast quarter (S½NE¼), South half of Northwest quarter (S½NW¼) and South half (S½) of Section Thirty-one (31); Northeast quarter (NE¼), North half of Northwest quarter (N½NW¼), Southeast quarter of Northwest quarter (SE¼NW¼), Northwest quarter of Southwest quarter (NW¼SW¼) and South half of Southwest quarter (S½SW¼) and Southeast quarter (SE¼) of Section Thirty-two (32); all of Section Thirty-three (33); Northwest quarter of Northeast quarter (NW¼NE¼), South half of Northeast quarter (S½NE¼), Northwest quarter (NW¼) and South half (S½) of Section Thirty-four (34); all in Township Fifty-eight (58) North, Range Eighty-seven (87) West, Wyoming Meridian;

Southeast quarter of Southeast quarter (SE¼SE¼) and Southeast quarter of Southwest quarter (SE¼SW¼) (or Lot 6) in Section Thirteen (13); South half (S½) (or Lots 1, 2, 3, 4, 5, 6, 7 & 8) in Section Fourteen (14); Southeast quarter (SE¼) of Section Fifteen (15) excepting about three (3) acres in the northwest corner thereof, also all that portion of the East half of Southwest quarter

(E½SW¼) of said Section Fifteen (15) now owned by the parties of first part; Southwest quarter (SW¼) (or Lots 3, 4, 5 and 6) in Section Eighteen (18); North half (N½), Southwest quarter (SW¼) and West half of Southeast quarter (W½SE¼) of Section Nineteen (19); Northeast quarter (NE¼) and all that portion of the East half of Northwest quarter (E½NW¼) now owned by the parties of first part, all in Section Twenty-two (22); Northeast quarter (NE¼), Northwest quarter of Northwest quarter (NW¼NW¼) and South half (S½) of Section Twenty-three (23); East half (E½) and East half of Northwest quarter (E½NW¼) of Section Twenty-four (24); North half (N½) and Southeast quarter (SE¼) of Section Twenty-five (25); North half of Northeast quarter (N½NE¼) and a triangular tract in the northeast corner of the Northwest quarter (NW¼) of Section Twenty-six (26); the West half (W½) of Section Twenty-nine (29); all of Section Thirty (30); all of Section Thirty-one (31); North half of Northwest quarter (N½NW¼), Southwest quarter of Northwest quarter (SW¼NW¼) and West half of Southwest quarter (W½SW¼) of Section Thirty-two (32); all in Township Fifty-eight (58) North, Range Eighty-eight (88) West, Wyoming Meridian;

North Half of Southeast quarter (N½SE¼) (or Lots 1 and 2), North half of Southwest

quarter (N½SW¼) (or Lots 3 and 4), South half of Southeast quarter (S½SE¼) and South half of Southwest quarter (S½SW¼) of Section Thirteen (13); North half of Southeast quarter (N½ SE¼) (or Lots 1 and 2) and South half of Southeast quarter (S½SE¼) of Section Fourteen (14); North half of Northeast quarter (N½NE¼ of Section Twenty-three (23); North- [17] east quarter (NE¼), North half of Northwest quarter (N½NW¼), Southeast quarter of Southwest quarter (SE¼ SW¼), South half of Southeast quarter (S½ SE¼) and Northeast quarter of Southeast quarter (NE¼SE¼) of Section Twenty-four (24); East half (E½), East half of Northwest quarter (E½NW¼) and Northeast quarter of Southwest quarter (NE¼SW¼) of Section Twenty-five (25); Southeast quarter of Southeast quarter (SE¼SE¼) of Section Thirty-five (35); North half (N½), Southwest quarter (SW¼), North half of Southeast quarter (N½ SE¼), and Southwest quarter of Southeast quarter (SW¼SE¼) of Section Thirty-six (36); all in Township Fifty-eight (58) North, Range Eighty-nine (89) West, Wyoming Meridian;

The hereinbefore described land containing in all approximately Seventeen Thousand Three Hundred (17,300.00) acres, more or less, according to the Government Surveys thereof; said mortgaged lands be subject, however, to rail-

road rights of way thru same, as same may have been heretofore deeded.

Also, all water rights now used or hereafter acquired for use on said above described premises however the same may be evidenced. Together with all rights herein evidenced in lateral ditches, right of way or easements in any wise connected therewith or used to carry water to or upon said lands above described.

And the said parties of the first part hereby expressly waive and release any and all right, benefit, privilege, advantage and exemption, under and by virtue of any and all statutes of the State of Wyoming, providing for the exemption of homesteads from sale on execution or otherwise.

To have and to Hold the said above described premises unto the said party of the second part, its successors and assigns forever. Together with the privileges, hereditaments and appurtenances thereunto in anywise appertaining or belonging.

And the said parties of the first part, for their heirs, executors and administrators, do covenant and agree, to and with the said party of the second part, his heirs, executors, administrators and assigns, that at the ensealing and delivery of these presents they were well seized in the said premises, in and of a good and indefeasible estate, in fee simple.

And that they are free from all incumbrances whatsoever. [18]

And that they have good and lawful right to sell and convey the same, and that they will Warrant and defend the same against all lawful claims and demands whatsoever.

And the said Fra M. Dana, wife of the said Edwin L. Dana (who received title to some of the lands herein described as E. L. Dana), upon the consideration aforesaid, does hereby release and forever quit-claim unto said party of the second part, his heirs, executors, administrators and assigns, all her rights of dower and homestead in and to the above granted premises.

Provided, always, and these presents are upon this express condition, that if the said parties of the first part shall and do well and truly pay or cause to be paid unto the said party of the second part, its certain attorney, successors or assigns, the sum of Two Hundred Thousand Dollars ($200,000), plus interest on same, according to the condition of four (4) certain promissory notes, bearing even date herewith and executed by the said Edwin L. Dana and Fra M. Dana, his wife, payable to Samuel McKennan, the party of the second part, in the respective amounts and due and payable as follows:—

One note for $50,000 dated September 29, 1919, due October 1, 1924;

One note for $50,000 dated September 29, 1919, due October 1, 1924;

One note for $50,000 dated September 29, 1919, due October 1, 1924;

One note for $50,000 dated September 29, 1919, due October 1, 1924;

all of said notes bearing interest according to the tenor of the coupons attached to same, said interest being due and payable on April 1st and October 1st, each year; both principal and interest due and payable at the Union Bank and Trust Company, Helena, Montana, which said sum of money the said Edwin L. Dana (who received title to some of the lands herein described, as E. L. Dana) and Fra M. Dana, his wife, hereby covenant to pay, together with interest thereon as agreed upon, and until such payment, shall pay all taxes and assessments upon the above described premises, or upon this mortgage, or the debt hereby secured, and all assessments for maintaining ditches [19] or supplying water to said described lands, before the same become delinquent, and shall keep the buildings thereon insured against fire in a sum not less than [illegible] Dollars, for the benefit of the said party of the second part, his heirs, executors, administrators and assigns, with such insurance company or companies as they shall approve, then these presents and said promissory notes shall cease and be null and void. And if said parties of the first part shall fail to pay all taxes or assessments, or shall fail to keep the buildings upon said premises insured, as above provided, then, and in that case, the said party of the second part, his heirs, executors, administrators or assigns are hereby authorized to pay said taxes and assessments and to pay for said insurance, and all such sum or sums

of money so expended shall be added to the debt hereby secured, and the same shall draw interest at the rate of seven per cent per annum, payable at interest maturing dates on said notes.

And it is hereby further provided that in case any installment of principal or any part thereof, or any interest moneys, or any part thereof, hereby secured to be paid, shall remain due and unpaid for the space of thirty days after the same shall, by the terms hereof, become due and payable, that then, and in that case, the whole principal sum hereby secured to be paid, together with the interest thereon, shall, at the option of the said party of the second part, his heirs, administrators, executors or assigns, become due and payable forthwith, anything herein or in said promissory notes contained to the contrary notwithstanding.

And in case default shall be made in the payment of the said principal sum of money hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, then it shall and may be [20] lawful for the said party of the second part, his heirs, executors, administrators or assigns, to sell and dispose of said above described premises, and all the right, title, benefit and equity of redemption of said parties of the first part, their heirs or assigns therein, at public auction, for cash, according to the statute in such case made and provided, and in the manner therein prescribed, and out of the money arising from such sale, to retain the said

principal and interest, together with the cost and expenses of such sale, and attorney, solicitor or counsel fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs, executors, administrators or assigns, and in any proceeding in equity to foreclose this mortgage, said solicitor fees shall be taxed as costs in said action.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

EDWIN L. DANA (Seal)
FRA M. DANA (Seal)

Signed, sealed and delivered in presence of:—
H. C. SCHUYLER
JOSEPH W. CHIVERS [21]

State of Montana
County of Lewis and Clark—ss.

I, Joseph W. Chivers, a Notary Public in and for the State of Montana, do hereby certify that said Edwin L. Dana (who received title to some of the lands herein described, as E. L. Dana) and Fra M. Dana, his wife, personally known to me as the persons whose names are subscribed to the annexed deed, appeared before me this day in person, and acknowledged to me that they signed, sealed and delivered said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth, and expressly waived and released all right, title and benefit of exemption under any and

all Homestead Exemption Laws, so called, of said State of Wyoming.

And I further certify that Fra M. Dana, wife of the said Edwin L. Dana (Who received title to some of the lands herein described, as E. L. Dana), was by me first examined separate and apart from her said husband in reference to the signing and acknowledging such deed, the nature and effect of said deed being explained to her by me, and that she being by me fully apprised of her right, and of the effect of signing and acknowledging said deed, did then acknowledge that she freely and voluntarily signed and acknowledged the same for the uses and purposes therein set forth, and expressly waived and release all her rights and advantages under and by virtue of all laws of said State of Wyoming, relating to the Exemption of Homesteads.

Given under my hand and Notarial Seal, this 29th day of September, A. D., 1919.

(Notarial Seal) JOSEPH W. CHIVERS
Notary Public for the State of Montana; residing at Helena, Montana.

My commission expires September 9, 1921.
$40.00 revenue stamps affixed to notes & cancelled.

[22]

EXHIBIT "B"

This indenture, made the 29th day of September, in the year of our Lord one thousand nine hundred nineteen by and between E. L. Dana and Fra M. Dana, his wife, of the County of Sheridan and State

of Wyoming, the parties of the first part, and Samuel McKennan, of the County of Lewis and Clark, State of Montana, the party of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of Two Hundred Thousand Dollars lawful money of the United States of America to them in hand paid by the said party of the second part, the receipt whereof is hereby ackowledged, do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, his heirs and assigns, forever, all the certain lots, pieces or parcels of land situate, lying and being in the County of Big Horn, and State of Montana, particularly described as follows, to-wit:

The West Half (W½) of Section Thirty-one (31), Township Nine (9) South, Range Thirty-six (36) East, Montana Meridian,

The West half (W½) and Southwest quarter of Southeast quarter (SW¼SE¼) of Section Thirteen (13); North half of Northeast quarter (N½ NE¼), Southeast quarter of Northeast quarter (SE¼NE¼) and Southeast quarter (SE¼) of Section Fourteen (14); North half of Northeast quarter (N½NE¼), Southeast quarter of Northeast quarter (SE¼NE¼) and East half of Southeast quarter (E½SE¼) of Section Twenty-three (23); West half (W½) of Section Twenty-four (24); South half of Northeast quarter (S½NE¼) and Southeast quarter (SE¼) of Section Twenty-five (25); and Northeast quarter (NE¼) of Section Thirty-six (36); all in Township Nine (9) South,

Range Thirty-five (35) East, Montana Meridian;

Subject, however, to railroad rights of way thru any of the foregoing land, which may have been heretofore deeded. [23]

The foregoing described lands containing in all the sum of approximately Eighteen Hundred Seventy (1,870) acres, more or less, according to the Government Surveys thereof, together with all water, water rights, ditches, aqueducts, appropriations and franchises upon, leading to, connected with or usually had and enjoyed in connection with said described premises and each and every part and parcel thereof whether represented by shares of capital stock in any ditch company or by actual individual ownership or otherwise, or which may hereafter be acquired by the said party of the first part during the existence of this Mortgage and used in connection with the said described premises or any part thereof. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining.

The said parties of the first part represent to and covenant with the said party of the second part, his heirs and assigns, that they will Warrant and Defend said premises against the lawful claims of all persons whomsoever, and the said parties of the first part hereby relinquish all right of dower and all right of homestead accruing or to accrue in and to said premises.

This Indenture Is Intended as a Mortgage to secure the payment of four (4) certain promissory notes, executed by E. L. Dana and Fra M. Dana,

his wife, payable to Samuel McKennan, each note for the sum of Fifty Thousand Dollars ($50,000), aggregating Two Hundred Thousand Dollars ($200,000.00), said notes being dated September 29, 1919, maturing October 1st, 1924, and bearing interest according to the tenor of the coupons thereto attached, said interest due April 1st and October 1st, each year, both principal and interest due and payable at the Union Bank and Trust Company, Helena, Montana.

It is agreed that if the parties of the first part fail to pay said principal or interest or any part thereof when due, [24] or any taxes, assessments or insurance premiums as hereinafter provided, or fail to comply with any one of the conditions of this mortgage, then all of said debts shall at the option of the party of the second part become due and collectible and all rents and profits of said property shall then immediately accrue to the benefit of said party of the second part, and the occupants of said property shall pay rent to the said party of the second part or his agent, and this mortgage may be foreclosed for the full amount together with costs, taxes, insurance premium and a reasonable attorney's fee for plaintiff's attorney to be fixed and allowed by the court, and any other and all sums advanced or expense incurred on account of said parties of the first part for whatsoever purposes paid; and any advances paid shall draw interest at the rate of seven per cent per annum and be liens under this mortgage. In case of fore-

closure hereof the cost of an abstract of title shall be taxed as a part of the costs in the case and paid by the parties of the first part, and the plaintiff in such foreclosure suit shall be entitled upon his demand, and without the necessity of showing any cause therefore, to have a receiver appointed to take charge of said property, and to collect the rents and profits thereof and with the same powers as if appointed under statutory provisions; and the said party of the second part may be appointed such receiver. The omission of the party of the second part to exercise the option herein provided for at any time or times shall not preclude said party of the second part from the exercise of such option at any subsequent default or defaults of the parties of the first part in payment as aforesaid. And said party of the second part is not required to give any notice as to the exercise of said option but may proceed at any time or times after any default shall have occurred, to sell the property herein described and collect the amount due hereunder, or at his option to institute suit for the foreclosure hereof in the courts in the ordinary way, it being [25] expressly understood and agreed that in case of default the said party of the second part, or in case of his absence, death, refusal to act, or disability in any wise, the (then) acting Sheriff of Big Horn County, Montana, at the request of the legal holder of said Notes may proceed to sell the property hereinabove described, or any part thereof, at public vendue, to the highest bidder, at the front

door of the Court House, in the said Big Horn County, Montana, for cash, of which sale at least twenty days' notice of the time, terms and place of sale, and of the property to be sold, shall be advertised in some newspaper, printed and published in the said Big Horn County, and upon such sale shall execute and deliver a deed in fee simple of the property sold to the purchaser or purchasers thereof, and receive the proceeds of said sale; and the moneys realized from such sale, after payment of the costs, charges, expenses of said sale, including reasonable attorney's fees and the repayment of all sums of money advanced by the party of the second part, his heirs or assigns, be applied to the payment of the indebtedness hereby secured.

It is further agreed that until said debt is fully paid the parties of the first part shall keep all legal taxes and assessments against said property and the interest of the party of the second part or his assigns therein by virtue of these presents, fully paid and shall keep all insurance in a reliable insurance company or companies to the amount of at least ..... Dollars on the buildings on the described premises for the benefit of the said party of the second part, his heirs and assigns, and to deliver to the said party of the second part or his agent said policy or policies of insurance and renewals thereof to be held until said debt is fully paid, and it is hereby made a part of this instrument that said insurance shall be in a company or companies satisfactory to the said party of the

second part or his agent, and [26] said party of the second part or his agent may at his option designate the company or companies in which such insurance shall be written, and for such purpose the party of the second part is hereby appointed and constituted the agent of the parties of the first part; and in event of injury or destruction of said building by fire, the said party of the second part is hereby expressly authorized to make settlement with the insurance companies for the amount of insurance that may be paid thereon and to receive money due upon such insurance, and for the purpose of making such receipt and settlement the said party of the second part is constituted the attorney in fact of the parties of the first part with full power to do all and everything proper and necessary to be done in and about such settlement and receipt of insurance money as fully to all intents and purposes as the parties of the first part might or could do if personally present; and on default the party of the second part may pay such incumbrance, taxes and assessments, or effect such insurance and collect the amount thereof with seven per cent interest, and in the event of any of the taxes or assessments on said premises or the interest of the party of the second part or his assigns therein by virtue of these presents becoming delinquent and the said party of the second part purchasing said property at public sale, it is hereby agreed as a part of this indenture that said party of the second part shall be entitled to the full penalty

authorized by law to be added to the amount of said taxes or assessments so paid, which entire sum shall then become a part of the debt hereby secured and bear interest at the rate of seven per cent per annum from date of purchase, and said party of the second part may without delay at his option enter upon and take possession of said described property, and said party of the second part is not required to give notice as to the exercise of such option. [27]

It is further agreed that said parties of the first part shall keep all buildings, fences or other improvements on said premises in as good repair and condition as the same are at this date.

It is further agreed that in the event of the commencement of an action for the foreclosure of this mortgage the attorney's fee herein provided for shall become due, and should said party of the second part, his heirs or assigns become involved in litigation by reason hereof or should the title of the parties of the first part be called in question in any action or proceeding in any court or before the Land Department of the United States and the party of the second part shall make expense thereto or incur expense in defending for the parties of the first part, all the costs and expenses incurred therein shall be paid by the parties of the first part, and the same recovered as a part of the money hereby secured.

It is further agreed that if on the sale of the mortgaged property it fails to bring sufficient to pay the entire debt hereby secured, with interest,

costs, attorney's fees and disbursements, the parties of the first part shall pay the deficiency.

And it is expressly understood that the terms, conditions and provisions hereof whether so expressed in each case or not shall apply to and bind the respective parties, their heirs, executors, administrators and assigns.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year herein first above written.

[Seal] E. L. DANA

[Seal] FRA M. DANA

Signed and Sealed in the presence of

H. C. SCHUYLER [28]

State of Montana,
County of Lewis and Clark—ss.

On this 29th day of September, nineteen hundred and nineteen before me Joseph W. Chivers, a Notary Public for the State of Montana, personally appeared E. L. Dana and Fra M. Dana, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

(Notarial Seal) JOSEPH W. CHIVERS

Notary Public for the State of Montana residing at Helena, Montana.

My commission expires Sept. 9th, 1921.

$40.00 Revenue stamps affixed to notes and cancelled. [29]

EXHIBIT "C"

MORTGAGE DEED

This deed, made this 21st day of July in the year of our Lord one thousand nine hundred and twenty-six between Edwin L. Dana and Fra M. Dana, his wife, of the County of Sheridan, State of Wyoming, parties of the first part and Samuel McKennan, of the County of Lewis and Clark, State of Montana, party of the second part;

Witnesseth, that the said parties of the first part, for and in consideration of the sum of ($200,000.00) Two Hundred Thousand Dollars to them in hand paid, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said party of the second part, and unto his successors, heirs, administrators, executors and assigns, forever, all that piece or parcel of land, situate, lying and being in the County of Sheridan and the State of Wyoming,—hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State, and more particularly known and described as follows, to-wit: South half of Northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) and Northeast quarter of Southwest quarter ($NE\frac{1}{4}SW\frac{1}{4}$) of Section Twenty-four (24) and Southeast quarter of Northeast quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Twenty-three (23), in Township Fifty-eight (58) North, of Range Eighty-nine (89) West of the 6th Principal

Meridian, Sheridan County, State of Wyoming, containing One Hundred Sixty (160) acres; to have and to hold the said above-described premises unto the said party of the second part, his successors, heirs, executors, administrators and assigns forever. Together with the privileges, hereditaments and appurtenances thereunto in any wise appertaining or belonging.

And, the said parties of the first part, for themselves, their ..... successors, heirs, executors, administrators and as- [30] signs, do..... covenant and agree, to and with the said party of the second part, his successors, heirs, executors, administrators and assigns, that at the ensealing and delivery of these presents said Edwin L. Dana and Fra M. Dana, his wife, are well seized in said premises, in and of good and indefeasible estate, in fee simple.

And that they are free from all incumbrances whatsoever.

And that they have good and lawful right to sell and convey the same, and that they will warrant and defend the same against all lawful claims and demands whatsoever.

And the said Fra M. Dana, wife of the said Edwin L. Dana, upon the consideration aforesaid, does hereby and forever quitclaim unto said party of the second part, his successors, heirs, executors, administrators and assigns, all her rights of homestead in and to the above granted premises.

Provided, always, and these presents are upon this express condition, that if the said parties of

the first part shall and do well and truly pay or cause to be paid to the said part..... of the second part, or his certain attorney, successors, heirs, executors, administrators or assigns, the sum of ($200,000.00), plus interest on same, as evidenced by four (4) promissory notes, bearing date September 29, 1919, executed by said Edwin L. Dana and Fra M. Dana, his wife, payable to Samuel McKennan, in amounts and maturities as follows, to-wit:

One note for $50,000 dated September 29, 1919, due October 1, 1924;

One note for $50,000 dated September 29, 1919, due October 1, 1924;

One note for $50,000 dated September 29, 1919, due October 1, 1924;

One note for $50,000 dated September 29, 1919, due October 1, 1924;

all bearing interest according to the tenor of the coupons attached to same, or expressed therein, said interest being due and payable on April 1st and October 1st of each year; both principal and interest due and payable at Union Bank and Trust Company, of Helena, Montana;

according to the conditions of ..... certain promissory note....., bearing even date herewith, and executed by said ..... to the said part..... of the second part, which sum or sums of money [31] the said Edwin L. Dana and Fra M. Dana, his wife, hereby covenant to pay, and until such payment, shall pay all taxes and assessments upon the above described premises; and shall keep the buildings

thereon insured against fire in the sum of not less than ..... dollars during the life of this mortgage, for the benefit of and payable to the said party of the second part, his successors, heirs, executors, administrators and assigns, with such insurance company or companies as they shall approve; then these presents and said notes shall cease and be null and void. And if parties of the first part shall fail to pay all taxes or assessments upon said premises, or shall fail to keep the buildings upon said premises insured, as above provided; then, and in that case, the said party of the second part, his successors, heirs, executors, administrators or assigns, are hereby authorized to pay said taxes and assessments and to pay for said insurance, and all such sum or sums of money so expended shall be added to the debt hereby secured, and the same shall draw interest at the same rate.

And it is hereby further provided that in case any installment of principal or any part thereof, or any interest moneys, or any part thereof hereby secured to be paid, shall remain due and unpaid for the space of thirty days after the same shall, by the terms hereof, become due and payable; then, and in that case, the whole principal sum hereby secured to be paid, together with the interest thereon, shall, at the option of said party of the second part, his successors, heirs, executors, administrators or assigns, become due and payable forthwith, anything herein or in said promissory notes.

And in case default shall be made in the payment of the said principal sum of money hereby intended

to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, then it shall and may be lawful for the said party of the second part, his successors, heirs, executors, administrators or assigns, to sell and dispose of said above-des- [32] cribed premises, and all the right, title, benefit and equity of redemption of said parties of the first part, their heirs, executors, administrators or assigns therein, at public auction, for cash, according to the statute in such case made and provided and in the manner therein prescribed, and out of the money arising from such sale, to retain the said principal and interest, together with the costs and expenses of such sale and ..... Dollars for attorney, solicitor or counsel fees, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs, successors, executors, administrators or assigns, and in any proceeding in equity to foreclose this mortgage; said solicitor fee shall be taxed as costs in said action.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

EDWIN L. DANA (Seal)
FRA M. DANA (Seal)

Signed, Sealed and Delivered in the presence of
J. J. BENTLEY

The State of Wyoming,
County of Sheridan—ss.

On this 21st day of July, 1926, before me personally appeared Edwin L. Dana and Fra M. Dana, his wife, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed, including the release and waiver of the right of homestead, the said wife having been by me fully apprised of her right and the effect of signing and acknowledging the said instrument.

Given under my hand and Notarial seal, this 21st day of July, A. D. 1926.

(Notarial Seal) J. J. BENTLEY
Notary Public

My commission expires on the 3rd day of April, A. D. 1927.

[Endorsed]: Filed June 7, 1938. [33]

Thereafter, on October 27, 1939, the ORDER OF THE COURT APPROVING AND CONFIRMING PROPOSAL OF DEBTOR, was duly filed and entered herein, being in the words and figures following, towit: [34]

[Title of District Court and Cause.]

The proceeding here is under Section 75 (a) to (r) of the National Bankruptcy Act as amended. Title 11, U.S.C.A., Sec. 203. One of the principal

questions to be determined is whether the application by debtor for confirmation of an extension proposal has been accepted in writing by a majority in a number of all creditors, whose claims have been allowed, including secured creditors whose claims are affected, which number shall represent a majority in amount of such claims (Sub. Sec. g).

After a hearing in April, 1938, at which debtor and objecting creditors appeared and submitted evidence in respect to the sufficiency of the original petition for administration of debtor's property under Section 75, and after arguments of counsel for the respective parties and claimants, the court held that the petition was in proper form and that the petitioner was qualified under the governing statute, and that the petition should be filed and referred to the conciliation commissioner and the petitioner accorded relief under the bankruptcy Act aforesaid, providing he complied with the provisions thereof.

Thereafter another hearing was held on the application of debtor for confirmation of an extension proposal and on objections by creditors that debtor had failed to comply with the provisions of subsection g; arguments were heard, and briefs thereafter submitted; this is the principal matter before the court at this time. After consideration of transcript, exhibits, reports, briefs and other pertinent papers and files in said cause, consisting of 600 pages or more, in the court's opinion, there can be

no doubt that this essential fact of acceptance of debtor's [35] proposal as required by statute, a prerequisite to confirmation, has been established by evidence that is clear and convincing.

After the court had determined that debtor was qualified to seek relief under Section 75, the case was referred to D. L. Egnew, Conciliation Commissioner of Hardin, Big Horn County, Montana, in which county a part of the real and personal property of debtor is situated, and since the month of April, 1938, the officer above named, has been constantly in touch with the management of debtor's property and directed the administration of the estate in accordance with the provisions of the statute, and because of the extent and value of the properties involved has devoted the greater part of his time, since the case was referred to him, to a consideration of the questions arising, which frequently required his presence on the property and an inspection of the various parcels of land and other property involved, situated in Montana, as aforesaid, and in Sheridan County, Wyoming; all of which was in addition to the usual office work required, which was augmented by hearings and reports to the court and his attendance at hearings before himself as commissioner and also before the court. As a result of his investigations concerning the affairs of the estate, assets and liabilities, claims against it, the extent and value of the resources at hand and the character of the management, the Commissioner states in his report to the court,

among other things, as follows: "it is recommended to the court that the extension proposal be confirmed, the court to retain sufficient jurisdiction of said debtor and its property to supervise the income and expenses of said debtor." Reports of the Commissioner are to be deemed presumptively correct, but subject to review by the court; if the court should find that error has been committed the report may be rejected in whole or in part; if otherwise it may be adopted, or modified as circumstances seem to require. G.O.Rule [36] No. XLVII. The following rule should also be noted: "Insofar as is consistent with the provisions of Section 75 and of this general order, the Conciliation Commissioner shall have all the powers and duties of a referee in bankruptcy and the General Orders in Bankruptcy shall apply to proceedings under said Section". General Order L, subdivision 11. Again rule No. XII provides: "and thereafter, all the proceeding, except such as are required as by the Act or by these general orders, to be had before the Judge, shall be had before the referee." The report of the commissioner is presumed to be correct, and that presumption is strengthened by consideration of the matters set forth and the standing of the officer who wrote it.

Before confirmation of a proposal the court must be satisfied: "that (1) it includes an equitable and feasible method of liquidation for secured creditors and of financial rehabilitation for the farmer; (2) it

is for the best interests of all creditors, and (3) the offer and its acceptances are in good faith, and have not been made or procured except as herein provided, or by any means, promises or acts herein forbidden. In application for extension, the court shall require proof from each creditor filing a claim that such claim is free from usury as defined by the laws of the place where the debt is contracted." Sub.-Div. i.

From a fair consideration of the case as presented it seems to the court that debtor has complied with the provisions of the statute as above outlined, and that debtor's proposal should be approved in accordance with the recommendation of the Conciliation Commissioner, and such is the order of the court; and it therefore follows that the several objections to confirmation of proposal and motions to dismiss should be and are hereby overruled and denied.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Oct. 27, 1939. C. R. Garlow, Clerk. By C. G. Kegel, Deputy. [37]

Thereafter, on March 25, 1940, Order Approving Claim of Frank Bogart, a Creditor, was duly filed and entered herein, being as follows, towit: [38]

[Title of District Court and Cause.]

ORDER APPROVING CLAIM OF FRANK BOGART, A CREDITOR

In the opinion of this Court relating to the claim of Frank Bogart, a creditor, filed herein on the 27th day of October, 1939, it is said:

> "By consent of debtor and claimant, the matter here in controversy was heard before the conciliation commissioner who reported to the court as follows: 'It is, therefore, recommended that claimant, Frank Bogart, be required to either return one set of notes, or to properly protect debtor against the negotiation and presentation for payment thereof, if said notes are lost, and that he be required to release one of the duplicate mortgages of record.' A reasonable recommendation and therefore adopted."

And it appearing that the said Bogart has released E. L. Dana and Fra Dana from all personal liability upon the promissory notes referred to and mentioned in said claim and secured by the mortgages, copies of which are made exhibits to said claim, and it further appearing that there has been filed by the said Bogart proper and sufficient release of the mortgage of the E. L. Dana Livestock Company recorded in the office of the County Clerk of Sheridan County, Wyoming in Book 39 of Mortgages, at page 392, and also a proper and sufficient release of the mortgage made by the E. L. Dana Livestock Company and recorded in the office of the

County Clerk and Recorder of Big Horn County, Montana, in Book 19 of Mortgages, at pages 234 and 235, and that the time for the presentation of any claim, based upon the promissory notes purporting to be secured by said mortgages, has expired.

It is now ordered that the claim of Frank Bogart be and the same is hereby approved and allowed as filed. [39]

Dated this 25th day of March, 1940.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered March 25, 1940. C. R. Garlow, Clerk. By C.G. Kegel, Deputy. [40]

Thereafter, on December 9, 1940, Petition of Frank Bogart, a creditor, for an order to show cause why mortgages securing claim of Frank Bogart should not be foreclosed, was duly filed herein, being as follows, towit: [41]

[Title of District Court and Cause.]

PETITION

Your petitioner, Frank Bogart, respectfully states as follows:

That on or about the 27th day of September, 1940, he notified the debtor that he elected to accept a payment of ten per cent. of the indebtedness to him as established by the approval of his claim, in lieu of rent, as provided in the proposal of the debtor.

That no payment whatever has been made to your petitioner of any amount of his claim.

Wherefore, your petitioner prays that the debtor be required to show cause why this proceeding should not be dismissed, or your petitioner granted permission to enforce collection of his claim by foreclosure of the mortgages upon which such claim is based.

FRANK BOGART,
Claimant.

GUNN, RASCH, HALL & GUNN
Attorneys for Claimant.

State of Montana,
County of Lewis and Clark—ss.

Frank Bogart being duly sworn, deposes and says: That he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge.

FRANK BOGART

Subscribed and sworn to before me this 9th day of December, 1940.

[Notarial Seal] A. A. MAJOR
Notary Public for the State of Montana. Residing at Helena, Montana.

My commission expires Feb. 28th, 1943.

[Endorsed]: Filed Dec. 9, 1940. C. R. Garlow, Clerk. [42]

Thereafter, on January 3, 1941, a Return to Order to Show Cause issued on Petition of Frank Bogart, was duly filed herein, being as follows, towit: [43]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

For its answer and return to the order to show cause secured herein by Frank Bogart, the above named debtor respectfully alleges and shows to the Court

(1) That on the nineteenth day of December, 1940, the debtor forwarded to the Conciliation Commissioner herein the sum of Fifteen thousand four hundred eighty two dollars and fifty cents ($15,482.50) with the suggestion that such amount be forwarded to Frank Bogart as payment in full of the ten per cent (10%) due him upon his claim as filed. That the said Conciliation Commissioner, in accordance with the order of this Court, forwarded the same for deposit in Great Falls and forwarded to Frank Bogart said amount less two per cent (2%) which debtor is informed and believes was deducted by the said Conciliation Commissioner as a part of the cost of supervision properly taxable to the said Frank Bogart in this proceeding.

(2) That the debtor arrived at said sum of Fifteen thousand four hundred eighty-two dollars and fifty cents ($15,482.50) by computing the amount due upon said claim as of the date of the commencement of this proceeding, to-wit: One hundred fifty

thousand dollars ($150,000.00) principal plus interest to April thirteenth, 1938, at six per cent (6%) per annum which made the amount of principal and interest due as of that date of One hundred fifty four thousand eight hundred twenty-five dollars ($154,825.00).

(3) The debtor verily believes that said amount so paid to the said Frank Bogart is the true amount to which the said Frank [44] Bogart was and is entitled to receive. The said Frank Bogart has received said sum but the said Frank Bogart through his attorneys insisted that the amount of said payment should be figured upon a slightly different basis, to-wit: Ten per cent (10%) of the amount due of principal and interest as of the date of payment and despite having received said payment seek to maintain their motion on the order to show cause.

(4) That the difference arrived at between the two methods of computation is the sum of Two thousand three hundred ninety-five dollars ($2,395.00) and the debtor is able to pay said sum if its basis for computation is erroneous.

(5) That the delay in making said payment to the said Frank Bogart from December first as fixed in its proposal to December nineteenth was occasioned by the facts that one of the attorneys for debtor, to-wit: S. C. Ford, was in the last general election elected Governor of the State of Montana and his time has been completely taken up with

preparations to assume the duties of that office, and the other attorney was absent due to the serious illness of his father about the time that said payment should have been made, and the Managing Agent of the debtor did not wish to make said payment without the advice of his counsel. That the attorneys for said debtor had advised the officers of this debtor that the method adopted by the debtor in computing the amount of said payment was the correct one and the amount of said payment was made in accordance with the opinion of counsel for the debtor.

(6) That shortly before said payment became due by the terms of the proposal and the order confirming it, debtor became engaged in a series of negotiations with creditors having secured claims and whose security consisted of machinery and chattels and in accordance with the priorities and equities of the situation entered into tentative agreements with the several creditors in such class to pay said claims in full instead of only part thereof. That said secured creditors had security that was depreciat- [45] ing in value and each of said creditors offered inducements to the debtor to pay their claim in full. That said inducements, in accordance with the order of this Court as of March eighth, 1940, were sufficient to cause the Conciliation Commissioner to approve such settlements, and pursuant to such settlements the debtor did pay in full the following claims: Midland Implement Company,

Connolly Machinery Company, Austin Western Company, H. S. Withington, Percy and Emma Glenn, and did make a novation with C. E. Clark whereby said claim was released and is now negotiating with Abbott Company and has executed its check in payment of said claim and the same is true of the claim of John Stark. That all of said creditors have waived the claim for interest and have discounted the face of their claim in various amounts. All of such settlements so approved by the Conciliation Commissioner and paid by the debtor were very beneficial to the debtor and particularly to its unsecured creditors but that paying said claim in full rather than ten per cent (10%) thereon reduced the amount of cash on hand and debtor does not desire, unless ordered by the Court, to pay the said Frank Bogart any more on his claim at the present time.

(7) That on or about the twenty-fifth day of October, 1940, debtor offered to pay the claim of the said Frank Bogart in full if the said Bogart would accept cattle at the market price therefor or offered to undertake to pay said claim in full if the said Frank Bogart would offer inducement therefor as required by the order of this Court for paying claims out of turn but that the said Frank Bogart, through his attorney, stated to the attorney for the debtor that he did not care to accept cattle for any amount nor to reduce his claim in any amount whatsoever. [46]

(8) That at the commencement of this proceeding the value of the real estate security held by the

said Frank Bogart was several times the amount of the debt and that since said time the debtor has made many valuable improvements thereon by constructing and repairing ditches, fences, buildings, and storage facilities, roads, bridges, corrals, and other improvements.

(9) That under all of the circumstances of this proceeding, it would be inequitable and unjust to the debtor and its unsecured creditors either to dismiss this proceeding or to permit the said Frank Bogart to commence any proceeding for the foreclosure of his real estate mortgage or to permit foreclosure of the real-estate mortgage claimed to be owned by him.

(10) That affiant is informed, verily believes that shortly before the securing of the order to show cause one of the attorneys for Frank Bogart talked on the telephone with the Conciliation Commissioner and with C. E. Miller, Jr., the Managing Agent of the debtor, and received assurances that said sum will be paid within thirty (30) days; whereas, said sum was paid within nineteen (19) days.

Wherefor, debtor prays that having fully shown cause herein why this proceeding should not be dismissed nor the said creditor permitted to foreclose that the Court make an appropriate order that the said Frank Bogart be denied the relief prayed for.

Debtor further prays that if the Court finds that the proposal and the order confirming it should be construed as contended for by Frank Bogart that

in that event debtor be granted permission to petition that its proposal be amended so as to provide for the annual payment of ten per cent (10%) of the amount due to any claim at the commencement of this [47] proceeding and to lower the interest rate to be charged on any claim during this proceeding by any secured creditor including Frank Bogart charging six per cent (6%) on more than One Hundred fifty thousand dollars ($150,000.00) and Abbott Company attempting to charge nine per cent (9%) on the balance of its claim which was originally approximately Nine Thousand three hundred dollars ($9,300) to three and a half per cent (3½%) per annum or such other interest rate as may be just pursuant to the decision in the case of Cohan versus Elder decided June 7th, 1940, by the United States Circuit Court of Appeals for the ninth circuit.

THE MILLER LAND AND
LIVESTOCK CO.
By C. LIEBERT CRUM,
C. Liebert Crum, its attorney.

State of Montana,
County of Yellowstone—ss.

C. Liebert Crum, being first duly sworn on oath states: that he is one of the attorneys for Miller Land and Livestock Company and makes this affidavit on its behalf. That he has read the foregoing answer and return, knows the contents thereof, and

that the same are true of his own knowledge save and *accept* those allegations which are made on information and belief and as to those allegations affiant states that he believes the same to be true. That affiant makes this affidavit on behalf of Miller Land and Livestock Company because the Managing Agent thereof and the other officers thereof are not presently available not being in the state of Montana or of Wyoming.

C. LIEBERT CRUM

Subscribed and sworn to before me this third day of January, 1941.

[Seal] R. M. WATERS

Notary Public for the State of Montana residing at Billings, Montana.

My commission expires Feb. 4, 1941.

[Endorsed]: Filed Jan. 3, 1941. C. R. Garlow, Clerk. [48]

Thereafter, on April 29, 1941, a Petition of Frank Bogart, creditor, for order directing Debtor to pay balance within reasonable time, or show cause why mortgages securing Bogart claim should not be foreclosed, was filed herein, being as follows, towit: [51]

[Title of District Court and Cause.]

PETITION

Your petitioner, Frank Bogart, respectfully states as follows:

That, although a reasonable time has elapsed, he has not been paid by the Debtor, or anyone, the balance found due and owing by the order made and entered herein, a copy of which is hereto attached, and that he is informed and advised by the Clerk of this Court that a copy of said order was mailed to E. Liebert Crum, one of the attorneys for the Debtor, on the 7th day of April, 1941. That the balance unpaid amounts to the sum of $2724.65.

Wherefore, your petitioner prays that an order be made directing said Debtor to make payment of said balance within a reasonable time to be fixed in said order and upon failure to do so to show cause why petitioner should not be permitted to foreclose the mortgages securing the payment of said claim.

FRANK BOGART,
Petitioner.

GUNN, RASCH and GUNN,
Attorneys for Petitioner.[52]

State of Montana,
County of Lewis and Clark—ss.

Frank Bogart, being duly sworn, deposes and says: That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

FRANK BOGART

Subscribed and sworn to before me this 29th day of April, 1941.

[Notarial Seal] A. A. MAJOR

Notary Public for the State of Montana. Residing at Helena, Montana.

My commission expires Feb. 28, 1943.

[Endorsed]: Filed April 29, 1941. C. R. Garlow, Clerk. [53]

[Title of District Court and Cause.]

The petition of Frank Bogart, one of the secured creditors in the above entitled cause, seeking the dismissal of said cause or else permission to foreclose his mortgages, for alleged failure to make certain payments therein set forth, came on regularly for hearing on the order to show cause and return thereto by the above named debtor.

The court has considered the arguments of counsel for both parties, and is of the opinion, under the facts presented here, that the payment in question should have equaled ten per cent of the indebtedness at the time of payment, which would have to be computed on the principal sum plus the accrued interest at that date. Otherwise the request in the petition to dismiss or allow foreclosure proceedings, is hereby denied.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Apr. 7, 1941. C. R. Garlow, Clerk. [54]

Thereafter, on April 29, 1941, Order requiring Debtor to Show Cause, was duly filed and entered herein, being as follows, towit: [55]

[Title of District Court and Cause.]

ORDER

It appearing that the Debtor has failed and neglected to make payment of the sum of $2724.65, the balance due and unpaid as found and determined by the Order of this Court dated April 7th, 1941:

It is ordered that said payment be made on or before the 10th day of May, 1941, or cause be shown before the above-entitled Court, in the Court Room of the Federal Building, in the City of Great Falls, Montana, at 10:00 o'clock A.M. on said day, why permission should not be granted to the claimant, Frank Bogart, to foreclose the mortgages securing the payment of his claim.

The Clerk is hereby directed to make service of this Order immediately, by mailing a certified copy thereof to E. Liebert Crum, one of the attorneys for the Debtor, at his post office address in Parkman, Wyoming.

Dated this 29 day of April, 1941.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered April 29, 1941. C. R. Garlow, Clerk. [56]

Thereafter, on May 7, 1941, Answer of Debtor to Petition of Frank Bogart; and Cross Petition of Debtor, were duly filed herein, being as follows, to-wit: [57]

[Title of District Court and Cause.]

ANSWER TO PETITION OF FRANK BOGART AND CROSS PETITION OF DEBTOR.

Comes Now the above named Farm Debtor and for its answer to the Petition of Frank Bogart respectfully shows to the Court:

I.

That the Court in its Order of April 29, 1941, is in error in figuring the amount due from the debtor to the said Frank Bogart according to the Court's previous Order of April 7th, 1941, in that the Court found that:

> "The payment should have equaled 10% of the indebtedness at the time of the payment, which would have to be computed on the principal sum plus the accrued interest at that date."

That the date referred to was December 19, 1940.

That the principal amount on that date was $150,000.00.

That the interest was from October 1st, 1937, at the rate of six per cent per annum and amounted at that date to $28,920.00.

That the principal and interest on that date amounted to $178,920.00.

That ten per cent thereof was $17,892.00 and that Debtor paid $15,482.00, making a difference of $2,410.00 instead of the $2,724.65 mentioned in the Court's Order of April 29, 1941.

II.

That a reasonable time to make such payment, considering the season of the year, the operations of the Debtor and the nature of its resources, has not elapsed since said order of April 7th, 1941 was served on Debtor or its attorney.

III.

That since the commencement of this proceeding the Debtor [58] has increased the value of the security of the said Frank Bogart in excess of $100,000.00 and that such improvements and repairs were necessary and proper in order to increase the productivity of the Debtor estate as a whole in order to more quickly and surely pay off the creditors of Debtor in accordance with its proposal. That the real estate upon which first mortgages exist claimed by Frank Bogart covers about 16,000 to 18,000 acres of the approximately 26,000 acres of the deeded land owned by Debtor and that the cost of all of said land was $1,102,908.33, and said land has now been improved as above stated and approximately eighty per cent of said land and value are subject to said mortgages of the said Frank Bogart. That

due to unusual financial and general economic conditions and existing litigation between Debtor and Fra and E. L. Dana pending in this Court and as yet un-adjudicated, Debtor has so far been unable to refinance the said Bogart claim but alleges that the said Frank Bogart is secured to an extent that to permit him to foreclose his said mortgages would enable him to take security worth $800,000.00 for a claim of approximately $180,000.00.

IV.

That there are approximately $200,000.00 of unsecured claims approved in this proceeding and that if the said Frank Bogart is permitted to commence a foreclosure action it will destroy the greater part of the value of the assets not covered by any mortgage to Frank Bogart and such unsecured creditors would get little or nothing under such conditions.

V.

That due to unusual requirements and rulings of the Department of the Interior the Debtor has been required to, and did, post some $25,000.00 cash bond and to pay some $20,000.00 to pay for and secure in advance its Indian leases of approximately 12,000 acres, and to insure the most efficient [59] and economical operation Debtor has recently acquired some $12,000.00 worth of farm machinery for which it has paid part cash.

VI.

That Debtor has arranged credits of some $200,000.00 for the purchase of cattle to restock its range and has recently acquired 4400 good ewes for such purpose, but that such credits above mentioned are not available to pay Mr. Bogart who will be benefited by profits from such operations.

VII.

That the Debtor has on hand 150,000 pounds of alfalfa seed and some 1500 swine, but it will require some time to properly liquidate the same in a proper manner and if forced to liquidate any material part thereof without using care and time to properly market the same it will result in serious loss that could otherwise be avoided.

Wherefore, Debtor prays that the Court first consider the petition of the Debtor to reduce the interest on said claims as hereinafter set out and that the matter of payment be adjusted according to the Court's findings and in accordance with equity; that permission for the said Frank Bogart to foreclose his mortgages be denied; that the petition of Debtor for a reduction of interest on said claims be granted.

MILLER LAND AND LIVESTOCK COMPANY
By C. LIEBERT CRUM,
Its Attorney.

State of Montana,
County of Cascade—ss.

C. Liebert Crum, being first duly sworn on oath states: That he is the attorney for the Miller Land and Livestock Company, a corporation, and makes this affidavit on its behalf; that he has read the foregoing Answer to Petition of Frank [60] Bogart and Cross Petition of Debtor, knows the contents thereof and that the same are true to the best of his information, knowledge and belief.

C. LIEBERT CRUM

Subscribed and sworn to before me this 6th day of May, 1941.

[Seal] R. A. WAYMAN,
Notary Public for the State of Montana. Residing at Great Falls, Montana.

My commission expires Dec. 6, 1941.

[Endorsed]: Filed May 7, 1941. C. R. Garlow, Clerk. [61]

Thereafter, on May 7, 1941, Debtor's Cross Petition was duly filed herein, being as follows, to wit: [62]

[Title of District Court and Cause.]

CROSS PETITION

The above named Farm Debtor respectfully shows to the Court:

I.

That this is a proceedings under Section 75, a to r, under the National Bankruptcy Act relating to Agricultural Debt. Adjustments and that Frank Bogart on March 25, 1940 secured the approval of a secured claim for $150,000.00, with interest at the rate of six per cent per annum from October 1, 1937.

II.

That on October 27, 1939 the Court approved and confirmed the Proposal of the Petitioner which was for an extension only.

III.

That pursuant to said Proposal and Order Confirming the same, the said Frank Bogart elected to take ten per cent of the debt as his annual payment coming to him on December 1, 1940 and said creditor did on or about December 7, 1940, petition this Court to dismiss this proceedings or that it have permission to foreclose upon its security.

IV.

That on December 19, 1940, Debtor paid to the said Frank Bogart $15,482.50 and the Court denied the petition of said creditor, stating that the Court was of the opinion that the payment should have equaled ten per cent of the indebtedness due at the time of the payment rather than ten per cent of the amount of principal and interest due at the time of the commencement of this proceedings. [63]

V.

That the claim of the creditor herein is based upon a debt secured by a first real estate mortgage upon property that at the commencement of this proceedings was worth greatly in excess of the amount of the said mortgage thereon. That since said time Debtor, to increase the value and productivity thereof in order to pay off the said Frank Bogart and the other creditors as soon as possible and to preserve to the petitioner its valuable equity in said property, has made extensive and valuable improvements of such real estate and has secured property, necessary and adequate equipment to increase the income therefrom. That it has been necesary to secure part of such equipment on credit.

VI.

That petitioner believes and therefore alleges that the said Frank Bogart has not been and is not acting in good faith toward petitioner and its other creditors in that his actions demonstrate that he would rather have the security he claims than the money due him. That by acquiring the security he would make a large unearned and unjust profit at the expense of Debtor and its unsecured creditors and that in an effort to bring about such result he has maintained and contemplates maintaining a series of vexatious, harassing and unfounded objections, petitions, motions and other proceedings whereby he hinders Debtor from refinancing, takes

the time of its management and causes unnecessary expense to the Debtor.

VII.

That since the said mortgage debt was created, Debtor and its predecessors in interest have paid to Frank Bogart in various capacities or to his predecessors in interest approximately $220,000.00 in interest alone and petitioner is informed and believes and therefore alleges the fact to be that a payment of some $20,000.00 in addition was required by and paid to the said Frank Bogart individually by E. L. Dana as a [64] condition precedent to reducing the interest upon said indebtedness from eight per cent to six per cent and to verbally promising to extend said mortgage.

VIII.

That considering the value of the security, the amount of the investment, the present money market and all the circumstances surrounding such investment, as well as the best interests of all of the parties, including the unsecured creditors of Debtor who have claims of approximately $200,000.00, it is just, equitable and right that the Court should reduce the interest rate upon said claim from six per cent to three and one-half per cent per annum and that the Proposal heretofore made be modified accordingly insofar as the claim of Frank Bogart is concerned.

IX.

That such modification would not adversely affect any other creditor but would be of benefit to Debtor and such creditors.

X.

That recently your petitioner has acquired a large quantity of range in the form of various grazing permits on the Crow Indian Reservation in order to operate on a scale that petitioner believes will result in a larger net income than was possible to be obtained heretofore during this proceedings and is now engaged in securing adequate cattle and other livestock to stock said range and that to secure such stock your petitioner is required to use its resources to the fullest extent and, to secure proper credits therefor, it is necessary to tie up a considerable portion of its more liquid assets and that in the meantime it is not to the best interests of Debtor and its creditors to pay more interest than is absolutely necessary and that by presently conserving [65] its assets by reduction in interest rates as herein prayed for, Debtor believes and therefore alleges the fact to be that it will naturally lessen the time within which all creditors shall be paid.

Wherefore Debtor prays that the Court shall set a day for hearing this Petition and after notice to the said Frank Bogart of the issues herein involved and that the Court after being duly advised, make an order reducing the interest rate payable to the

said Frank Bogart from six per cent to three and one-half per cent per annum, or to such other rate as may to the Court seem proper, and that such order shall not only relate to future payments of interest on said obligation but to interest since the commencement of this proceedings.

MILLER LAND AND LIVE-
STOCK COMPANY
By C. LIEBERT CRUM,
Its Attorney.

State of Montana,
County of Cascade—ss.

C. Liebert Crum, being first duly sworn on oath states: That he is the attorney for the Miller Land and Livestock Company, a corporation, and makes this affidavit on its behalf; that he has read the foregoing petition, knows the contents thereof and that the same are true to the best of his information, knowledge and belief.

C. LIEBERT CRUM

Subscribed and sworn to before me this 7th day of May, 1941.

[Seal] R. A. WAYMAN,
Notary Public for the State of Montana. Residing at Great Falls, Montana.

My commission expires Dec. 6, 1941.

[Endorsed]: Filed May 7, 1941. C. R. Garlow, Clerk. [66]

Thereafter, on May 7, 1941, Order requiring Frank Bogart to show cause why debtor's Cross Petition should not be granted, was duly filed and entered herein, being as follows, to wit: [67]

[Title of District Court and Cause.]

ORDER

Upon reading and filing the hereunto annexed Cross Petition of the above named Debtor:

It Is Ordered, that a hearing be had thereon on the 23rd day of May, 1941, at the hour of 10 *am* o'clock A. M. of said day in the Court Room of Federal Building in Great Falls, Montana, and that Frank Bogart show cause at said time and place why said Cross Petition should not be granted.

The Clerk is hereby directed to make service of this Order and a copy of the said Answer and Cross Petition as soon as may be by mailing an attested copy thereof to Gunn, Rasch and Gunn, Attorneys for Frank Bogart, at their postoffice address in Helena, Montana.

Dated at Great Falls, Montana, this 6th day of May, 1941.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered May 7, 1941. C. R. Garlow, Clerk. [68]

Thereafter, on June 12, 1941, Objections to Granting of Petition of Debtor for reduction of rate of interest on the Bogart Claim was filed herein, being as follows, towit: [69]

[Title of District Court and Cause.]

OBJECTIONS TO GRANTING OF PETITION OF DEBTOR FOR REDUCTION OF RATE OF INTEREST ON THE BOGART CLAIM

Now comes Frank Bogart and in response to the order to show cause why the petition of the debtor for a reduction in the rate of interest on the Bogart claim should not be granted, objects to the granting of such relief upon the grounds and for the reasons:

1. That said petition does not state facts sufficient to warrant the granting of such relief.

2. That the Court is without authority, power or jurisdiction to grant such relief.

Dated this 31 day of May, 1941.

FRANK BOGART

GUNN, RASCH AND GUNN
Attorneys for Frank Bogart.

[Endorsed]: Filed June 12, 1941. C. R. Garlow, Clerk. [70]

Thereafter, on August 16, 1941, an Order Reducing Interest Rate on Claim of Frank Bogart was duly filed and entered herein, and is in the words and figures following, towit: [71]

[Title of District Court and Cause.]

The application of debtor for a reduction of interest on the Bogart claim, in the above entitled cause, is now before the court for consideration. The briefs for and against the application have been carefully considered, and as a result, the court is now convinced that the application of debtor presents a proper case for allowance of a reduction of interest, and that the court has authority to entertain such request; consequently, in the opinion of the court, the interest rate on the above claim should be reduced to 4% per annum, and it is so ordered.

CHARLES N. PRAY
Judge.

[Endorsed]: Filed & entered Aug 16 1941. C. R. Garlow, Clerk. By C. G. Kegel Deputy Clerk. [72]

Thereafter, on September 5, 1941, a Notice of Appeal was duly filed herein, being in the words and figures following, towit: [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Frank Bogart, a creditor, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered herein on the 16th day of August, 1941, re-

ducing the rate of interest on the claim of Appellant. to four per cent per annum.

Dated this 4th day of September, 1941.

GUNN, RASCH AND GUNN
Attorneys for Appellant, Frank Bogart.
By M. S. GUNN
A Member of said Firm.
Address: Helena, Montana.

[Endorsed]: Filed Sept 5, 1941. C. R. Garlow, Clerk. [74]

Thereafter, on September 8, 1941, Statement of Points upon which Appellant intends to rely on appeal, was duly filed herein, and being as follows, towit: [75]

[Title of District Court and Cause.]

STATEMENT OF POINTS

upon which Appellant intends to rely on the appeal herein from the order reducing the rate of interest on Appellant's claim to four per cent, filed and entered on August 16, 1941, to-wit:

1. That the Court was without jurisdiction to reduce the rate of interest on the Bogart claim to four per cent, as it appears that the value of the property mortgaged as security for the payment of the claim is largely in excess of the indebtedness.

2. That the petition for the reduction of the

rate of interest does not state facts sufficient to authorize such reduction.

Dated this 6th day of September, 1941.

GUNN, RASCH & GUNN,
Attorneys for Frank Bogart,
Appellant,
By M. S. GUNN
A Member of said Firm.
Address: Helena, Montana.

[Endorsed]: Filed Sept 8, 1941. C. R. Garlow Clerk. [76]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Montana
County of Lewis and Clark—ss.

M. S. Gunn, being first duly sworn, deposes and says: That he is a member of the firm of Gunn, Rasch and Gunn. That on the 6th day of September, 1941, he served a true and correct copy of the attached Statement of Points upon which Appellant intends to rely upon the appeal, upon the Miller Land and Livestock Company, above-named Debtor, by depositing the same in the Post Office at Helena, Montana, inclosed in a sealed envelope, with the necessary postage thereon, addressed to E. Liebert Crum, Attorney for said Miller Land and Livestock Company, at Parkman, Wyoming, his post office ad-

dress, as appears from the records and files in said matter.

M. S. GUNN

Subscribed and sworn to before me this 6th day of September, 1941.

(Notarial Seal) A. A. MAJOR

Notary Public for the State of Montana Residing at Helena, Montana.

My commission expires Feb. 28, 1943. [77]

Thereafter, on September 10, 1941, Designation of Portions of Record on Appeal, with Affidavit of service thereof, was duly filed herein, being as follows, towit: [78]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

Whereas, Frank Bogart has taken an appeal to the Circuit Court of Appeals for the Ninth Circuit from the order filed and entered August 16, 1941, reducing the rate of interest on his claim, as allowed, to four per cent per annum:

Now, therefore, in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, there is hereby designated the portions of the record to be contained in the record on appeal, as follows:

1. Proposal of Debtor.

2. Order or judgment approving and confirming proposal, dated October 27, 1939.

3. Claim of Frank Bogart.

4. Order approving Bogart claim, dated March 25, 1940.

5. Petition of Bogart for order directing debtor to show cause why mortgages securing Bogart claim should not be foreclosed, filed December 9, 1940.

6. Return of Debtor to order to show cause issued on petition of Bogart, filed January 3, 1941.

7. Order and decision that payment made by Debtor should have been 10% of principal and interest of Bogart claim at time of payment, filed April 7, 1941. [79]

8. Petition of Bogart for order directing Debtor to pay balance within a reasonable time or show cause why mortgages securing Bogart claim should not be foreclosed, filed April 29, 1941.

9. Order requiring Debtor to show cause, filed April 29, 1941.

10. Answer and Cross-Petition of Debtor, filed May 7, 1941.

11. Separate Cross-Petition of Debtor, filed May 7, 1941.

12. Order requiring Bogart to show cause, filed May 7, 1941.

13. Objections to granting of petition for reduction of interest on Bogart claim, filed June 12, 1941.

14. Order reducing rate of interest on Bogart claim to 4% per annum, filed and entered August 16, 1941.

15. Notice of Appeal to Circuit Court of Appeals, from order reducing interest on Bogart claim.

Dated this 6th day of September, 1941.

GUNN, RASCH AND GUNN,
Attorneys for Frank Bogart,
Appellant,
By M. S. GUNN
A member of said firm.
Address: Helena, Montana.

[Endorsed]: Filed Sept 10, 1941. C. R. Garlow, Clerk. [80]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

State of Montana
County of Lewis and Clark—ss.

M. S. Gunn, being first duly sworn, deposes and says: That he is a member of the firm of Gunn, Rasch and Gunn. That on the 6th day of September, 1941, he served a true and correct copy of the attached designation of portions of the record to be contained in the record on appeal upon the Miller Land and Livestock Company, above-named Debtor, by depositing the same in the Post Office at Helena, Montana, inclosed in a sealed envelope, with the necessary postage thereon, addressed to E. Liebert Crum, Attorney for said Miller Land and Livestock Company, at Parkman, Wyoming, his post office

address, as appears from the records and files in said matter.

M. S. GUNN

Subscribed and sworn to before me this 6th day of September, 1941.

(Notarial Seal) A. A. MAJOR

Notary Public for the State of Montana Residing at Helena, Montana.

My commission expires Feb. 28, 1943. [81]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 82 pages, numbered consecutively from 1 to 82 inclusive, is a full, true and correct transcript of all portions of the record and proceedings designated by the parties as the record on appeal in case Number 3406, In the Matter of Miller Land and Livestock Company, Debtor, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Seventeen and 65/100ths

($17.65) Dollars and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 6th day of October, A. D. 1941.

(Seal) C. R. GARLOW,
Clerk of U. S. District Court,
District of Montana.
By C. G. KEGEL
Deputy Clerk. [82]

[Endorsed]: No. 9946. United States Circuit Court of Appeals for the Ninth Circuit. Frank Bogart, Appellant, vs. Miller Land and Livestock Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed October 9, 1941.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States District Court for the District of Montana (Billings Division)

U. S. C. C. A. No. 9946

In the Matter of MILLER LAND AND LIVESTOCK COMPANY,

Debtor.

ADOPTION OF DESIGNATION OF PORTIONS OF THE RECORD AND STATEMENT OF POINTS FILED IN THE DISTRICT COURT OF MONTANA FOR THE PURPOSE OF PRINTING THE RECORD.

The Appellant, Frank Bogart, hereby adopts as the designation of the portions of the record to be printed and considered on the appeal and the statement of the points on which he intends to rely on the appeal, the statement of points and designation of parts of the record, copies of which are contained in the certified transcript and served and filed in the District Court pursuant to Rule 75 of the Rules of Civil Procedure for the District Courts of the United States.

Dated this 8th day of October, 1941.

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Attorneys for Frank Bogart, Appellant,
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[Endorsed]: U. S. B. T. A. Filed Oct. 10, 1941. Paul P. O'Brien, Clerk. [83]

No. 9946

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK BOGART,

Appellant

vs.

MILLER LAND AND LIVESTOCK COMPANY,

Appellee.

Brief for Appellant

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JURISDICTION

This is a bankruptcy proceeding instituted pursuant to the provisions of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203). The appellee made a proposal for an extension of time to pay its debts (R. p. 2). The proposal was confirmed and approved by the Court (R. p. 44). The appellant presented and filed a claim for $150,000.00, with interest thereon at the rate of six per cent. per annum from the 1st day of October, 1937, secured by mortgages upon the real estate of the debtor (R. p. 13). This claim was allowed and approved as filed (R. p. 49). The appellee filed a petition for a reduction of the rate of interest on the claim (R. p. 66). Ap-

pellant filed objections to the granting of the petition (R. p. 73). The objections were over-ruled and an order made reducing the rate of interest to four per cent. per annum (R. p. 74). The appeal is from this order. (R. p. 74).

Jurisdiction of the appeal is conferred upon this Court by Subdivision (a) of Section 47, Title 11, U. S. C. A., as amended which provides:

> "The Circuit Courts of Appeals of the United States * * * are hereby vested with appellete jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise or reverse both in matters of law and in matters of fact."

STATEMENT OF THE CASE

The claim of appellant is secured by mortgages upon the real estate of the debtor, appellee, who acquired the property subject to the mortgages without any assumption or agreement to pay the mortgage indebtedness.

In paragraph V of the verified petition for the reduction of the rate of interest, it is stated:

> "That the claim of the creditor herein is based upon a debt secured by a first real estate mortgage upon property that at the commencement of this proceedings was worth greatly in excess of the amount of the said mortgage

thereon. That since said time Debtor, to increase the value and productivity thereof in order to pay off the said Frank Bogart and the other creditors as soon as possible and to preserve to the petitioner its valuable equity in said property, has made extensive and valuable improvements of such real estate and has secured property, necessary and adequate equipment to increase the income therefrom." (R. p. 68).

In paragraph III of a verified answer and cross-petition filed by appellee to an application by appellant for permission to foreclose his mortgages, it is stated:

"That since the commencement of this proceeding the Debtor has increased the value of the security of the said Frank Bogart in excess of $100,000.00 and that such improvements and repairs were necessary and proper in order to increase the productivity of the Debtor estate as a whole in order to more quickly and surely pay off the creditors of Debtor in accordance with its proposal. That the real estate upon which first mortgages exist claimed by Frank Bogart covers about 16,000 to 18,000 acres of the approximately 26,000 acres of the deeded land owned by Debtor and that the cost of all of said land was $1,102,908.33, and said land has now been improved as above stated and approximately eighty per cent of said land and value are subject to said mortgages of the said Frank

Bogart. That due to unusual financial and general economic conditions and existing litigation between Debtor and Fra and E. L. Dana pending in this Court and as yet un-adjudicated, Debtor has so far been unable to refinance the said Bogart claim but alleges that the said Frank Bogart is secured to an extent that to permit him to foreclose his said morgtgages would enable him to take security worth $800,000.00 for a claim of approximately $180,-000.00". (R. pp. 63-64).

The validity of the order reducing the rate of interest is the question for decision by this Court.

SPECIFICATIONS OF ERRORS

1. The Court erred in reducing the rate of interest (R. p. 74).

2. The Court erred in deciding that the application for a reduction of the rate of interest presented a proper case for the allowance of a reduction.

3. The Court erred in deciding that it had authority to entertain the application (R. p. 74).

ARGUMENT AND AUTHORITIES

COURT WAS WITHOUT AUTHORITY TO REDUCE RATE OF INTEREST

According to all of the authorities, where the property mortgaged is ample security for the payment of the mortgage debt, the court, in a bankruptcy proceeding, is without authority to reduce the rate of interest. The mortgagee is entitled to

interest at the agreed rate until the mortgage debt is paid.

In the case of Coder v. Arts, 152 Fed. 943, decided by the Circuit Court of Appeals for the 8th Circuit, in an opinion by Circuit Judge Sanborn, it is said:

> "By the terms of the note and mortgage the mortgagor agreed to pay interest on his debt until it was paid, and that the mortgaged lands might be sold by the mortgagee, and that their proceeds might be applied to the payment of this debt and interest. The covenant for the sale and the application of the proceeds of these lands to the payment of the debt and interest was valid and binding, and it ran with the land, so that when the latter came to the hands of the trustee, *it was mortgaged for the payment of the interest as much as for the payment of the principal,* and the proceeds of its sale necessarily came to his possession subject to the same charge. Another rule might prevail if the proceeds of the mortgaged property were insufficient to pay the mortgage debt and its interest in full and the mortgagee was seeking to collect an unpaid balance by sharing with other creditors in the distribution of the common property. He might not be entitled, then, to recover from the proceeds of the common property interest upon his debt to any later date than the unsecured creditors would recover interest upon their claims. But the pro-

ceeds of these mortgaged lands appear to be ample to pay the principal and interest of the debt to the mortgage Arts, and where a trustee sells mortgaged property of the bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of the interest upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage." (Italics ours).

An appeal was taken to the Supreme Court of the United States in the case of Coder v. Arts, (213 U. S. 223, 53 L. Ed. 772), and, in concluding the opinion, the court said:

"Nor do we think the Circuit Court of Appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt."

In the case of Ticonic National Bank v. Sprague, 303 U. S. 406, 82 L. Ed. 926, the court said:

"This Court has already held that a lienholder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy" (Citing Coder v. Arts, 213 U. S. 223, 245, 53 L. Ed. 772, 782).

See also:

Mortgage Loan Co. v. Livingston, 45 Fed. (2d) 28;

In re Hagin, 21 Fed. (2d) 433;

San Antonio L. & T. Co. v. Booth, 2 Fed. (2d) 590.

The case of Sexton v. Dreyfus, 219 U. S. 339, 55 L. Ed. 244, has been sometimes cited in support of the contention that a secured creditor is not entitled to interest after the filing of a petition in bankruptcy by the mortgagor.

In the case of San Antonio L. & T. Co. v. Booth, cited above, the court said:

> "We are of opinion that the interest as specified in the mortgage, insofar as it can be satisfied out of the Loan and Trust Company's security, should be allowed up to the date of payment of the entire debt. * * * There is nothing in Sexton v. Dreyfus, 219 U. S. 339, 31 S. Ct. 256, 55 L. Ed. 244, in conflict with this view. In that case the secured creditors sold their securities after bankruptcy, and finding the proceeds not enough to pay principal and interest, attempted to apply the proceeds first to the interest which had accrued after bankruptcy, then to the principal, and finally to prove for the balance. It was held by the Supreme Court that this could not be done. But here the attempt is only to be paid out of the security."

Again, in the case of Peoples Homestead Assn. v. Bartlett, 33 Fed. (2d) 561, the court said:

> "We are of the opinion that appellant was entitled to interest on its mortgage up to the date of the completed sale."

The court further said:

> "Sexton v. Dreyfus, 219 U. S. 339, 31 S. Ct. 256, 55 L. Ed. 244, relied on by appellee, is not in conflict with the view indicated by the just quoted language. In that case the secured creditors had exhausted their security, and as to the fund in court were unsecured creditors. In Coder v. Arts, as in this case, the secured creditor had not exhausted his security, and sought to be paid, not out of a general fund that belonged to the unsecured creditors, but out of a special fund, derived solely from the sale of his security."

In foot note No. 31 to the case of Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, 79 L. Ed. 1593, in which the original Frazier-Lemke Act was held unconstitutional, it is said:

> "Counsel for the debtor suggests that the reasonable rental provided for in paragraph 7 is more than the secured creditor ordinarily receives in bankruptcy, since interest on secured as well as unsecured claims ceases with the filing of the petition. But the rule relied upon applies only when the secured creditor, having realized upon his security, is seeking as a general creditor to prove for the deficiency against the bankrupt estate. Sexton v. Dreyfus, 219 U. S. 339, 55 L. ed. 244, 31 S. Ct. 256, 25 Am. Bankr. Rep. 363. It has no application when the mortgagee has a preferred claim against proceeds realized by the trustee from

a sale of the security free of liens." (Citing Coder v. Arts, 213 U. S. 223, and other cases).

In the case of Bartles v. John Hancock Mutual Life Insurance Co., 100 Fed. (2d) 813, which involved a consideration of the Frazier-Lemke Act, as amended, the court said:

> "But secured creditors whose liens antedate the law have as to their security vested rights which must be effectuated."

In the same case before the Supreme Court of the United States, 308 U. S. 180, 84 L. Ed. 176, the court said:

> "The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, *the priorities and liens of secured creditors being preserved.*" (Italics ours).

It was because the Frazier-Lemke Act, as originally enacted, authorized the taking of the property of the mortgagee, in violation of the Fifth Amendment to the Federal Constitution, that the statute was declared unconstitutional.

> Louisville Joint Stock Land Bank v. Wm. W. Radford, 295 U. S. 555, 79 L. Ed. 1593.

It appeared in that case that Radford had mortgaged his farm to the Louisville Joint Stock Land Bank long prior to the enactment of the Frazier-

Lemke Act. In the opinion in the case the court said:

> "No instance has been found, except under the Frazier-Lemke Act, of either a statute or decision compelling the mortgagee to relinquish the property to the mortgagor free of the lien unless the debt was paid in full.
>
> This right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage."

The court further said:

> "It is true that the position of a secured creditor, who has rights in specific property, differs fundamentally from that of an unsecured creditor, who has none; and that the Frazier-Lemke Act is the first instance of an attempt, by a bankruptcy act, to abridge, solely in the interest of the mortgagor, a substantive right of the mortgagee in specific property held as security. * * * * * Because the Act is retroactive in terms and as here applied purports to take away rights of the mortgagee in specific property, another provision of the Constitution is controlling.
>
> Fourth. The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the States, it is not prohibited from impairing the obligation of contracts. Compare Mitchell

v. Clark, 110 U. S. 633, 643, 28 L. Ed. 279, 282, 4 S. Ct. 170, 312. But the effect of the Act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the Bank prior to the Act. In order to determine whether rights of that nature have been taken, we must ascertain what the mortgagee's rights were before the passage of the Act. We turn, therefore, first to the law of the State."

The court then discusses the law of Kentucky and, referring to the Frazier-Lemke Act, said:

"As here applied it has taken from the Bank the following property rights recognized by the law of Kentucky:

1. The right to retain the lien until the indebtedness thereby secured is paid."

In the case of Wright v. Mountain Trust Bank, 300 U. S. 440, 81 L. Ed. 737, in which the court had under consideration the Frazier-Lemke Act as amended, the court said:

"It is not denied that the new Act adequately preserves three of the five above enumerated rights of a mortgagee. 'The right to retain the lien until the indebtedness thereby secured is paid' is specifically covered by the provisions in ¶ 1, that the debtor's possession, 'under the supervision and control of the court', shall be 'subject to all existing mortgages, liens, pledges, or encumbrances', and that:

'All such existing mortgages, liens, pledges,

> or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear!!."

In the case of Borchard v. California Bank, 310 U. S. 311, 84 L. Ed. 1222, the court said:

> "As pointed out in the Wright case, supra, the secured creditors' rights are protected to the extent of the value of the property."

In the case of Consolidated Rock Products Co. v. DuBois, Vol. 85 Supreme Court, Law Edition, Advance Opinions, No. 9, page 603, which was a case arising under Section 77B of the Bankruptcy Act, the court said:

> "In the first place, no provision is made for the accrued interest on the bonds. This interest is entitled to the same priority as the principal."

In that case it was held that the stockholders of a corporation are not entitled to any consideration until after the creditors are paid in full.

In the case of Wright v. Union Central Life Insur. Co., Vol. 85 Supreme Court, Law Edition, Advance Opinions, No. 3, page 166, the Court, in discussing Section 75 of the Bankruptcy Act, said:

> "Safe-guards were provided to protect the rights of secured creditors throughout the proceedings to the extent of the value of the property."

The Court further said:

> "And the creditor will not be deprived of the assurance that the value of the property would be devoted to the payment of its claim."

As the property mortgaged is ample security for the payment of the mortgage debt, interest is collectible at the rate agreed upon to the time of payment of the indebtedness, and is secured by the lien of the mortgage the same as the principal of the debt.

The appellant by virtue of the lien of the mortgages is the owner of an interest in the mortgaged property equal to the principal and interest of his claim and as the value of the mortgaged property is greatly in excess of appellant's claim, the effect of the reduction of the interest on that claim is to take the property of appellant, to the extent of the difference between the contract rate of interest and the reduced rate and give it to the debtor or the unsecured creditors in violation of the Fifth Amendment to the Federal Constitution.

* * * * * * *

Subdivision (k) of Section 75 of the Bankruptcy Act (11 U. S. C. A. 203), provides:

> "Upon its confirmation, a composition or extension proposal shall be binding upon the farmer and his secured and unsecured creditors affected thereby: Provided, however, that such extension and/or composition *shall not reduce the amount of or impair the lien of any secured*

creditor below the fair and reasonable market value of the property securing any such lien at the time that the extension and/or composition is accepted, but nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured." (Italics ours.)

As the right of the mortgagee to the payment of the indebtedness secured by the lien of the mortgage in full when the property mortgaged is ample security for such payment, there is no more authority to deprive the mortgagee of his lien to the extent that it secures the payment of the interest than there is to deprive him of his lien as security for the payment of the principal of the indebtedness. This right of the mortgagee to the payment of interest, as well as principal, to the extent of the security furnished by the lien of the mortgage, is a vested right protected by the Fifth Amendment of the Federal Constitution.

Reading Subdivision (k), quoted above, in the light of the decisions hereinbefore cited, in which it was decided that where the property mortgaged is ample security for the payment of the mortgage debt, the right of the mortgagor to the payment of his debt in full is a a right protected by the Fifth Amendment to the Federal Constitution, the concluding words that "nothing herein contained shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured" can only apply to a secured

debt where the security is insufficient and the creditor is entitled to participate with the unsecured creditors, as in the case of Sexton v. Dreyfus, 219 U. S. 339, 55 L. Ed. 244. Furthermore the concluding words of the subdivision above quoted cannot have any application where the debtor is not personally liable and the creditor must look solely to the lien of his mortgage for payment. Such a construction harmonizes these words with the express declaration "that such extension and/or composition shall not reduce the amount of, or impair the lien of any secured creditor below the fair and reasonable market value of the property securing any such lien at the time the extension and/or composition is accepted". To construe the concluding words of Subdivision (k) as authorizing the Court to reduce the rate of interest, where the debt does not exceed "the fair and reasonable market value of the property", would clearly render the statute unconstitutional in view of the decision in the Louisville Joint Stock Land Bank case, 295 U. S. 555, 79 L. Ed. 1593.

PROPOSAL OF DEBTOR WAS FOR AN EXTENSION AND NOT A COMPOSITION

In the proposal of the debtor (R., p. 2) it is stated: "Debtor proposes to pay all creditors in full." It is further stated that the unpaid balances on the claims of the secured creditors "to bear interest at the existing contract rate."

This is not a proposal for composition but a proposal for extension. The distinction between a com-

position and an extension proposal is discussed in the case of Heldstab v. Equitable Life Assurance Society, 91 Fed. (2d) 655. The court in the opinion in that case said:

> "Composition by creditors with their debtor in bankruptcy is an agreement between them that the latter will pay down and the former will accept a named per cent of their claims in full satisfaction. * * * *An extension proposal is an agreement on the part of the creditors that they* will extend the time within which their claims *are probably to be paid, in full, as to secured creditors on the terms proposed by the debtor and approved by the court.*" (Italics ours.)

Subdivision (1) of Section 75 of the Bankruptcy Act, Section 203, Title 11, U. S. C. A., recognizes the distinction between an extension proposal and a composition proposal, and provides that:

> "The court may, after hearing and for good cause shown, at any time during the period covered by an extension proposal that has been confirmed by the court, set the same aside, reinstate the case, and modify the terms of the extension proposal."

The proposal of the debtor in this case is an extension proposal, in which he agreed to pay all claims, including the claim of appellant, in full.

Considering the distinction between a composition proposal and an extension proposal, we submit that the authority granted by Subdivision (1)

"to modify the terms of the extension proposal" does not authorize the Court to substitute for the extension proposal a composition proposal which would be the effect of permitting the debtor to discharge his property from the lien of the mortgages securing the Bogart claim, by paying less than the amount agreed to be paid.

As the order reduces the rate of interest only on the appellant's claim, it is clearly in violation of the agreement with appellant resulting from the confirmation of the proposal.

* * * * * * *

Attention is directed to the fact that the legal rate of interest in Montana is six per cent (Sec. 7725, Revised Codes of Montana, 1935).

COHAN V. ELDER, 112 FED. (2d) 967

The case of Cohan v. Elder, 112 Fed. (2d) 967, was cited in the lower court as a controlling authority in support of the application for a reduction in the rate of interest.

A reading of the opinion in that case will disclose that at the time of the order reducing the rate of interest the property mortgaged was insufficient security. The court in the opinion, in discussing the value of the property, said:

> "The property well could be completely restored to a value exceeding any tax liens and appellants' debt in the 17 months still to elapse prior to the conclusion of the three-year period."

It should further be noted that the reduction of the rate of interest was made for only the period *"pending the court's administration"* and that the reduction applied to the interest on the claims of all creditors.

That case is also distinguishable for the reason that the debtor was personally liable for the mortgage indebtedness, whereas in this case the only liability is against the mortgaged property.

In the case before the court, as alleged in the petition for the reduction of interest, the claim is secured by a mortgage upon property "worth greatly in excess of the mortgage thereon". In the answer and cross-petition, filed on May 6, 1941 (R. p. 62), the debtor alleges:

> "That the said Frank Bogart is secured to an extent that to permit him to foreclose his said mortgages would enable him to take security worth Eight Hundred Thousand Dollars for a claim of approximately One Hundred Eighty Thousand Dollars".

* * * * * * *

As decided by the Supreme Court of the United States in the cases cited, the interest is just as much a part of the indebtedness secured by the mortgage as the principal, and the Court is clearly without jurisdiction to require appellant to accept less than the principal and interest of his claim. To construe the Bankruptcy Act as permitting a reduction of the amount of the principal or of the interest, where

the property, as in this case, is worth several times the indebtedness, would render the Act violative of the Fifth Amendment to the Federal Constitution.

Respectfully submitted,
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For the Ninth Circuit

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Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The Appellant's statement of the case fails to mention facts which Appellee deems essential to a consideration of the issues involved on this appeal. Appellee therefore respectfully presents its own statement of the case.

The Appellee, Miller Land and Livestock Company, is the same corporation as the E. L. Dana Livestock Company, there having been a change of corporate name. These names are sprinkled throughout the record and some confusion might result unless this be known. While Appellee deems it immaterial, it no place appears in the record that Appellee "acquired the property subject to the mortgage without any assumption or agreement to pay the mortgage debt", as stated in the first paragraph of Appellant's statement

of the case. It does appear that the claim that Frank Bogart filed is merely a claim against the property of the debtor. (R. p. 13.) It also appears that Mr. Bogart released E. L. Dana and Fra Dana from personal liability upon the promissory notes mentioned in said claim, and that, "There has been filed by the said Bogart proper and sufficient release of the mortgage of the E. L. Dana Livestock Company recorded", etc. (R. p. 14.)

If Appellant has a claim only against the property of the Appellee it appears to be by his own act of choosing to be in that position.

The Appellant did not deny the truth of Appellee's petition for a reduction in the interest rate but contented himself with contending that the Court had no jurisdiction to grant such reduction and that the petition did not state facts sufficient to warrant the granting of such relief. (R. p. 73.)

The petition requesting such relief was a cross petition to a petition by Appellant for permission to foreclose his mortgage. (R. pp. 61-66.)

The order appealed from was the result of the last series of proceedings involving the correct interpretation of certain terms of the order of March 8, 1940, confirming the proposal and providing how it should be carried out. This order is not in the record but the parties by stipulation have agreed that the Court may consider it, if it is believed to be material by the Court.

From the uncontradicted petition asking for the reduction of the interest rate, it appears that "Frank

Bogart is not acting in good faith toward petitioner and its other creditors in that his action demonstates that he would rather have the security than the money due him". That by so doing he would make a large, unearned and unjust profit at the expense of the Debtor and its unsecured creditors. That in an effort to bring about such a result he has maintained a series of vexatious, harassing and unfounded objections, petitions, motions, and other proceedings, etc. (R. p. 68. Par. VI.)

That on the mortgage involved Appellant Bogart has already received $220,000 in interest and a bonus of $20,000 for a verbal promise to extend the mortgage and reduce the interest from 8% to 6%. (R. p. 69.)

That the Debtor in order to increase the productivity of the property and to more quickly pay off its creditors has made, since the commencement of this proceeding, extensive and valuable improvements of the security which was worth greatly in excess of the mortgage at the commencement of the proceeding. (R. p. 68.)

That considering the value of the security, the amount of the investment, the present money market and all the circumstances surrounding such investment as well as the best interests of all the parties, including unsecured creditors who have claims of approximately $200,000, it is just, equitable and right that the Court should reduce the interest rate, etc. and "that the proposal heretofore made be modified accordingly, insofar as the claim of Frank Bogart is concerned". (R. p. 69. Par VIII.)

That by presently conserving the assets of the Debtor by a reduction of the interest rate it will lessen the time within which all creditors shall be paid. (R. p. 70.) That the security is worth $800,000 and the claim (then) was approximately $180,000. Since then $17,877.50 has been paid and other payments are pending. (R. p. 63-64.)

The Court below heard the statements of Counsel, called for briefs and being convinced that the Court had authority to entertain the request and that a proper case had been presented reduced the rate from 6% to 4%.

The petition asked for a reduction of interest rate not only as to future payments but to interest since the proceedings were commenced April 13, 1938.

ARGUMENT AND AUTHORITIES.

THIS PROCEEDING is very similar to a corporate reorganization proceeding. The purpose is the same and with certain statutory differences the jurisdiction of the Court is the same. Details may differ but fundamentally the proceedings are the same. Due to the fact that there has been more corporate reorganizations than corporation proceedings under Section 75 a to r, we must of necessity seek for precedence established under Sections 77, 77B and similar laws.

In such proceedings objections have frequently been raised by creditors claiming vested rights. They have claimed that various acts of the Court deprived them

of their property without due "process of law", or that other constitutional provisions prevented the Courts from interfering with such vested rights.

THE QUESTION.

May the Court in a proceeding under Section 75 a to r of the National Bankruptcy Act reduce the interest rates on a secured claim from 6% to 4%. The creditor says no. The debtor and the Lower Court say yes.

If there ever was a case wherein the discretion and the equitable power of the Court should be exercised in favor of a debtor and its unsecured creditor this is such a case.

By the record in this case the debtor charges and the creditor admits the following:

a. That the security is worth $800,000.

b. The debt (at that time and it has since been reduced) was $180,000.

c. That the creditor, in bad faith, wants the $800,000 value of the security instead of wanting his claim paid.

d. That to bring about such an end (getting $800,000 instead of $180,000) he has maintained and intends to continue to maintain a series of unfounded, harassing and expensive series of objections, motions and proceedings.

e. That to reduce the interest rate will materially hasten the time when all claims will be

paid in full and the debtor financially rehabilitated.

f. That considering the nature of the security, the amount of the investment, and the present money market, it is just, equitable and right that the interest rate be so reduced.

g. That on such loan the creditor has received, in interest alone, $220,000 as well as $20,000 payment for a verbal promise to reduce the interest and extend the mortgage, (mortgage was due by its terms, October 1, 1924) but payments were kept up to October 1st, 1937 and $50,000 was paid on the principal. (See last paragraph of Creditor's claim pages 14-15 of record.)

h. That the security is not deteriorating or lessening in value but is being increased in value through the efforts of debtor to more quickly pay off its Creditor.

i. That the creditor released the makers of the notes and mortgages involved from all personal liability thereon and was required to and did release a second set of mortgages by the E. L. Dana Livestock Company (the same Company) and now claims benefit to himself in this proceeding because, he says, his claim is only against the property of the debtor.

In the light of the foregoing facts, appearing of record, Appellee wonders why the creditor is not also insisting that he be paid both principal and interest in gold coin of the United States of the standard of weight and fineness of September 29, 1919. (The note R. p. 15.)

Subdivision (k) of Section 75 (11 U. S. C. A. 203) provides insofar as material to this issue that:

> "Nothing herein shall prevent the reduction of the future rate of interest on all debts of the debtor, whether secured or unsecured."

But say counsel for Appellant, to give effect to such provision in this case would be contrary to the provision of the Constitution of the United States which provides:

> "No person—shall—be deprived—of property without due process of law."

The text of 12 C. J. 1195 in commenting generally on objections based on this amendment says:

> "So numerous, so varied, and in many cases so trifling have been the questions raised as to the protection afforded by the guaranty of due process of law, that objections founded on it have been judicially characterized as 'those last resorts of desperate cases' ".

Appellee believes that the following citations throw light upon the question involved. For example, in the case of *In Re Central Funding Corporation* (C. C. A. (2d) 1935) 75 Fed. (2d) 756, 27 A. B. R. (N. S.) 764, in a proceedings under 77B, a nonassenting secured creditor objected when the Court ordered that possession and title of real estate which it held under its contract and to which it claimed a vested right, be taken from the creditor in exchange for securities of a new corporation on substantially different terms.

The Court held that this did not violate the fifth amendment either with respect to due process or otherwise. In so holding the Court said, "It makes no difference whether the debtor has an equity or not, or whether his business is to continue for five or ten years or indefinitely".

In *Campbell v. Alleghany Corporation* (C. C. A. (2d) 1935) 75 F (2d) 947, 27 A. B. R. (N. S.) 504, the Court said in a very illuminating discussion of the Fifth Amendment and its application to the rights of a secured nonassenting creditor in a proceeding under 77B. (Par. 8, 9, and 10.)

> "Little need be said as to the question which arises under the Fifth Amendment—But *as any exercise* of the bankruptcy law impairs the obligation of contracts such an impairment is not to be taken as in itself a denial of due process. For the provisions of the Act to violate the Amendment, they must be so grossly arbitrary and unreasonable as to be 'incompatible with fundamental law.' " "Its purpose (speaking of such legislation as is here discussed) should be forwarded by a fair and liberal construction of its provisions, not thwarted by any narrow or technical conditions, and certainly not by reading into its language conditions and limitations which the law-makers themselves did not see fit to express."

It is suggested that the above rule also implies that the Court should not read out of the law the condition that Congress put therein or to add a condition to a condition as Appellant contends should be done.

In the case of *In Re Prima Company* (C. C. A. 7th 1937) 88F (2d) 785, 33 A. B. R. (N. S.) 554, the assets of the corporation were asserted to be worth about three million dollars and the liabilities about one million, the lower Court authorized the issuance of $20,000 of receiver certificates to be prior to the underlying mortgage. In discussing the matter in the Circuit Court the general authority of the Court under Section 77B was discussed and the conclusions reached are summarized in the syllabus as follows:

(Paragraph 2)

"Bankruptcy legislation being expressly authorized by the Constitution, is not subject to the same Constitutional limitations as other legislation effecting debtors' and creditors' contractural rights and obligations."

(Paragraph 3)

"All parties to contracts are subject to power of Congress to legislate on subject of bankruptcy and are chargeable with knowledge that their rights and remedies are effected by existing and future bankruptcy laws" etc.

(Paragraph 6)

"Section of Bankruptcy Act, permitting modification of terms of contract between corporations petitioning for reorganization under such act and holders of its bonds as to extensions of time, *rate of interest,* or substitutions of other securities with consent of over two-thirds of bondholders heed *not unauthorized, the modifying existing contracts and contractive rights and remedies of minority bondholders objecting* to reorganization plan." (Emphasis supplied.)

This Court in the case of *In Re Los Angeles Lumber Products Company,* 100 F. (2d) 963 (1939) held that the rights of minority bondholders could be materially impaired or changed even tho they claimed, and in fact had, a vested right in specific property probably worth more than the secured indebtedness.

In the Case of *In Re Grand Rapids Railroad Company,* 28 F. Supp. 802, it was argued and the Court held as follows:

> "It is urged that the unknown bondholders have vested rights in the securities and that to turn the unclaimed securities over to the reorganized debtor would result in the unjust enrichment of the known bondholders and destroy substantive rights in violation of the Fifth Amendment of the United States, U. S. C. A. * * * The fact that this provision effects vested rights does not render it unconstitutional. The power of Congress to enact bankruptcy laws necessarily implies the power to effect vested rights of many kinds."

The Court's authority in proceeding under 75, 77, 77B and similar laws all stem from the constitution of the United States and from the same provisions of it. If the Court must give up its jurisdiction to reduce interest in proceedings under Section 75, if the particular security is worth more than the particular claim, it follows that it must likewise give up that power under 77, 77B and similar laws. This it cannot do without decreeing that under no circumstance can Congress make such a law nor can the Courts enforce it because in this case we have such a number of ad-

mitted reasons requiring such adjustment that to the writer it seems almost impossible to have more persuasive reasons for the Court's application of the law.

Any bankruptcy law is an interference with vested rights. One vested right is no more secured or sacred than another unless perhaps to interfere with it would shock the conscience of the Court and is in opposition to some fundamental law. The writer believes that if the Court's conscience is to be shocked, it should be shocked by the conduct of Appellant who "craves the law", who relies on the letter of his bond, who brazenly admits that he is acting in bad faith, in utter disregard for the welfare of other creditors and the debtor, and who in effect pleads guilty to a misuse of legal proceedings and who does not deny that he intends to continue to endeavor to do so in his efforts to unjustly enrich himself.

The principle of law expressed in the statute governing the right to reduce interest rates is as old as written law. Lest it be thought that this is a "novel" law or an unconsidered novation born of some peculiar passing condition and therefore properly to be construed out of existence, let the Court consider a provision of the oldest code of written law yet discovered. Consider the *Code of Hammurabi,* Sec. 48, which reads as follows:

> "If a man owe a debt and Ahad (The Storm God) undate his field and carry away the produce, or through lack of water, grain has not grown in the field, in that year he shall not make any return of grain to the creditor, he shall alter his

contract tablet and he shall not pay the interest for that year."

This law was written about 2250 B. C. or over 4000 years ago. The forbidding of taking any interest under certain conditions was deemed by farmer and government of that time to be necessary, just, and proper. Undoubtedly common sense, the law of self-preservation, and national, even tribal interest, dictated such law long before that time. Today, the course of events should constrain all of us to face facts, not fine-spun theories of vested rights in future payments. For many years usury and interest were synonymous and forbidden. Today we forbid usury but allow a rate of interest limited by law. In reorganization proceedings and in Section 75 the right to take interest *after* the proceedings start is subject to be regulated in accordance with the enlightened conscience of the Court considering all the circumstances of the particular case. This certainly should not shock the conscience of any Court nor does it violate any fundamental law. We believe the Court has so held in the case of *Cohan v. Elder,* 112 Fed. (2d) 967, 43 A. B. R. (N. S.) 478. The facts and the objections are almost exactly alike in both cases. In that case like this debtor was under 75 a to r operating on a confirmed extension proposal. The creditor was the holder of a trust deed upon the real estate of debtor. Debtor got back on his interest payments (6%) and petitioned the Court for additional time and for reduction of interest from 6% to 3½% on future payments. After the petition but

before the hearing, the debtor paid one installment. The creditor resisted the petition on various constitutional grounds and argued that a 3½% rate was confiscatory. In the present case our creditor says it deprives him of property without due process of law.

In order to more closely examine the facts in case of *Cohan v. Elder* the writer borrowed from the attorneys in that case a copy of the printed transcript of record, including the evidence, pleadings and exhibits and while all facts do not appear of record in the decision of the circuit court they are available. From such in the *Cohan v. Elder* record the writer points out additional points of similarity as follows:

The Court retained jurisdiction during the extension period for supervision. (Memorandum of Conclusions of District Judge.)

> "Debtor had an equity in excess of $20,000 in the property that is subject to the trust deed of creditor. (See same.) That the total value of the assets exceeded the total indebtedness." (Same source.)

The obligation was one consisting of $15,000 of mortgages assumed by the debtor when he purchased the property from the creditor and $20,500 in the form of an obligation of debtor to creditor secured by a trust deed and an unsecured note for $10,000. (Brief of creditor in *Cohan v. Elder* case.) The interest rate was originally 7% on part of the obligation (Source: Brief of creditor) and 6% on balance. (Same source.) The creditor argues that he had a "vested right" in

the interest payments and that to disturb them was unconstitutional. (Creditor's brief.)

In the *Cohan* case, however, the attorneys for the creditor argued that the property was not worth the amount of the debt it secured. The court found that it was worth more. In the present case appellant saves us the trouble of proving that by arguing that such fact is a reason why the interest should not be reduced and that therefore the Court has no jurisdiction nor Congress the power to allow such act. In other words the Court for the reasons argued by Appellant against the granting of the reduction, granted it in the *Cohan* case.

Appellant seeks to distinguish his case by stating that there was no debtor in this case, that the claim is against the security only. The record shows that Mr. Bogart for a long time was in the position of having:

1st. The original notes and mortgages of E. L. and Fra Dana on the security.

2nd. The notes and mortgages of the Debtor for the same amount and security.

3rd. Was trying to hold the Danas on their endorsement of the Debtor's notes. (2nd set.)

The record discloses that it was necessary for Debtor to secure a court order to compel appellant to carry out his agreement to release the Danas, both from their liability as makers on the original notes and as endorsers on the second set of notes. Under the circumstances here involved there is no reason for making a distinction because there is no debtor personally

obligated. Although it is not in the record we must assume the Court below had good grounds for its actions. The matter is a claim against the property of the Debtor and as such is listed in the law the same as any other claim.

The purpose of the entire Act and proceeding is the rehabilitation of the debtor—the protection of the farmer and his other creditors secured and unsecured from ruthless creditors who, the better they are secured, the more strenuously, even angrily insist that they should have the "Letter of the bond" and by so doing in a time of national emergency destroy an efficient economic unit.

The Old Bankruptcy Act, interpretations of which are so freely cited by the creditor, was concerned primarily with *distribution* of the bankrupt's assets. The enlightened purpose of the Act governing this proceeding is, with proper safeguard to the creditor, to *rehabilitate* the farmer debtor. Consequently the question is: Will reducing the interest rate 2% invade any constitutional right of this creditor? This Court has answered: No, in an exactly similar case. The second question is: Will it aid in rehabilitation of the debtor? The allegations of the petition show it would.

DISCUSSION OF AUTHORITIES CITED BY APPELLANT.

Having discussed the debtor's position let us briefly examine the creditor's citations:

He first cites *Coder v. Arts,* 52 Fed. 943, a case decided in 1907 on a mortgage dated 1904. It was a straight bankruptcy proceeding. The land security had been sold and under the law as it then existed, the only question was that of distributing the proceeds. The Court ruled that as there was ample funds the mortgagor took his claim in full before the unsecured Creditor participated. There was no Section 75 in those days and the Court had no discretion on such matters nor was there involved any question of best interests of all concerned, nor had the policy of rehabilitation of the debtor without liquidation been yet adapted as a sound national policy.

Perhaps even then on equitable principles, had the creditor conducted himself like Shylock he might have been denied his "vested right" to future interest payments at least. The other cases cited by Appellant along this same line are subject to the same criticisms which we will not repeat.

Appellee-debtor does not deny and never has denied that accrued interest to date of adjudication is not involved. However, interest to accrue after the proceedings start is, in a proper case, subject to the letter of the law and the discretion of the Court.

In the case of *John Hancock, Mutual Life Insurance Company v. Bartels,* the question passed upon was not the question under discussion here. It was under subsection s of Section 75 and involved only the question of whether a farmer who was not able to demonstrate that there was a reasonable probability

of being able to rehabilitate himself within 3 years by paying his debts in full, could file under Section s. The Court held that he could so file and in general terms cited the main provision of the law, without, however, having before it or even mentioning the question of a reduction of interest in a proper case. For this reason, although it is a decision of the Supreme Court, it should not be regarded as authority on the points of law involved here and was not intended by such Court to be such authority.

The case of *Louisville Joint Stock Land Bank v. Radford* (1935) cited by Appellant is not now the law. It was an adjudication on the original Section 75s. No Court that we are aware of has ever held any part of 75 a to r unconstitutional. In any event the questions here are not the same as there decided. In fact the reasoning in that case has been generally abandoned by the Court itself in later decisions. Could it have been shown in that case as in this that a lessening of the interest rate would have hastened the desirable ends of creditors being paid in full, probably the Court would not have gone so far in condemning the original subsection s in such stern terms. At best that case has more historical than present legal value.

The Court did recognize in that case that a minority member of a class could have his vested rights altered so it might be cited as authority for the appellee because in the next case cited by Appellant (*Wright v. Mountain Trust Bank,* 300 U. S. 440) it is held by the Court that the benefit derived from the farmer's continued possession is beneficial to the secured creditor

in several ways, viz.: less expense, probably more efficient management of property than could be obtained through a receiver or trustee and that, "The farmer's proceedings in bankruptcy for rehabilitation resembles that of a corporation for reorganization". In any event it is discussing subsection s, not 75 a to r, or the provisions relating to a reduction in interest.

If the Appellant's contention that the right to receive future interest payments were followed to its logical conclusion it logically seems that the Court could not order a sale of property free of liens because to do so would stop interest payments that he would receive in the future and which he ardently wishes to obtain for as long a period as possible. A well secured creditor receiving a high rate of interest would have every incentive to prolong his take indefinitely.

In the *Wright* case the Court also said, "A Court of bankruptcy may effect the interests of lien holders in many ways". It listed a few of the ways which were already recognized. It did not pass upon any question regarding a Court order reducing future interest but certainly it listed things much more drastic as being completely within the Court's power.

Appellant labors to emphasize the difference between an extension and a composition. Certainly an extension proposal may be modified by the Court for cause shown by exercising the specific authority to reduce interest no matter whether the original proposal was for composition or extension, or a mixture of the two.

Nothing in the law provided that the debtor must ask, or the Court lower interest on all claims at the same time; nothing in the record brought up by the Appellant shows whether the interest rates on other claims have been changed or not, nor does the record show what the interest rates on other claims are. It does show that it might be well for the Court to retain some control over a creditor who attempts to misuse his favored position as this creditor has done in this case.

The debtor is willing that the creditor get his just dues as soon as it is possible within the law and with due regard to the other creditors, particularly the large number of unsecured creditors. However, under the circumstances of this case, the creditor does not stand in Court with clean hands and certainly is not entitled to invoke the equitable discretion of the Court. He stands in this Court, self-confessed and unabashed, demanding his pound of flesh regardless of all other considerations or evil results to all others involved. He has been touched in his only tender spot, his pocket book, by the only thing that apparently hurts him, a reduction from 6% to 4% of the interest accruing and to accrue during this proceeding.

The debtor believes that the law should stand as written and that the discretion of the trial Judge was wisely used in following *Cohan v. Elder,* supra, and reducing the interest rate on this claim from 6% to 4%.

This creditor appears to the debtor as one who believes that individual economic anarchy is guaranteed

to him by the Constitution. At best he says he has not had "due process of law", as to future interest payments. He does not argue that the reduced interest is not fair or adequate. On the record he admits that it is reasonable. He simply argues that this Court should read into the law an exception which Congress did not see fit to pass. He admits that he and the other creditors will get their claims paid in full sooner than they would if the interest was not reduced. Surely this should compensate for, and balance this slight and temporary inconvenience he experiences now.

As to his argument that in the *Cohan v. Elder* case the interest rate was reduced only as to the time of the proceedings it is without weight for the entire debt is scheduled to be paid in full during the proceedings and his right to receive any interest from this debtor shall stop when he is paid his principal plus interest at 6% to the start of the proceedings plus 4% on that balance, and on the unpaid balances to the date of the final payment. He has already received much. He has done much wrong that he does not deny. He should not receive more from the hands of any Court.

Dated, Parkman, Wyoming,
December 22, 1941.

Respectfully submitted,
C. Liebert Crum,
Attorney for Appellee.